

17
TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 792. 171

**CASSIUS B. THOMAS, WILLIAM D. EDDY, AND EDGAR
D. STARBUCK, PLAINTIFFS IN ERROR,**

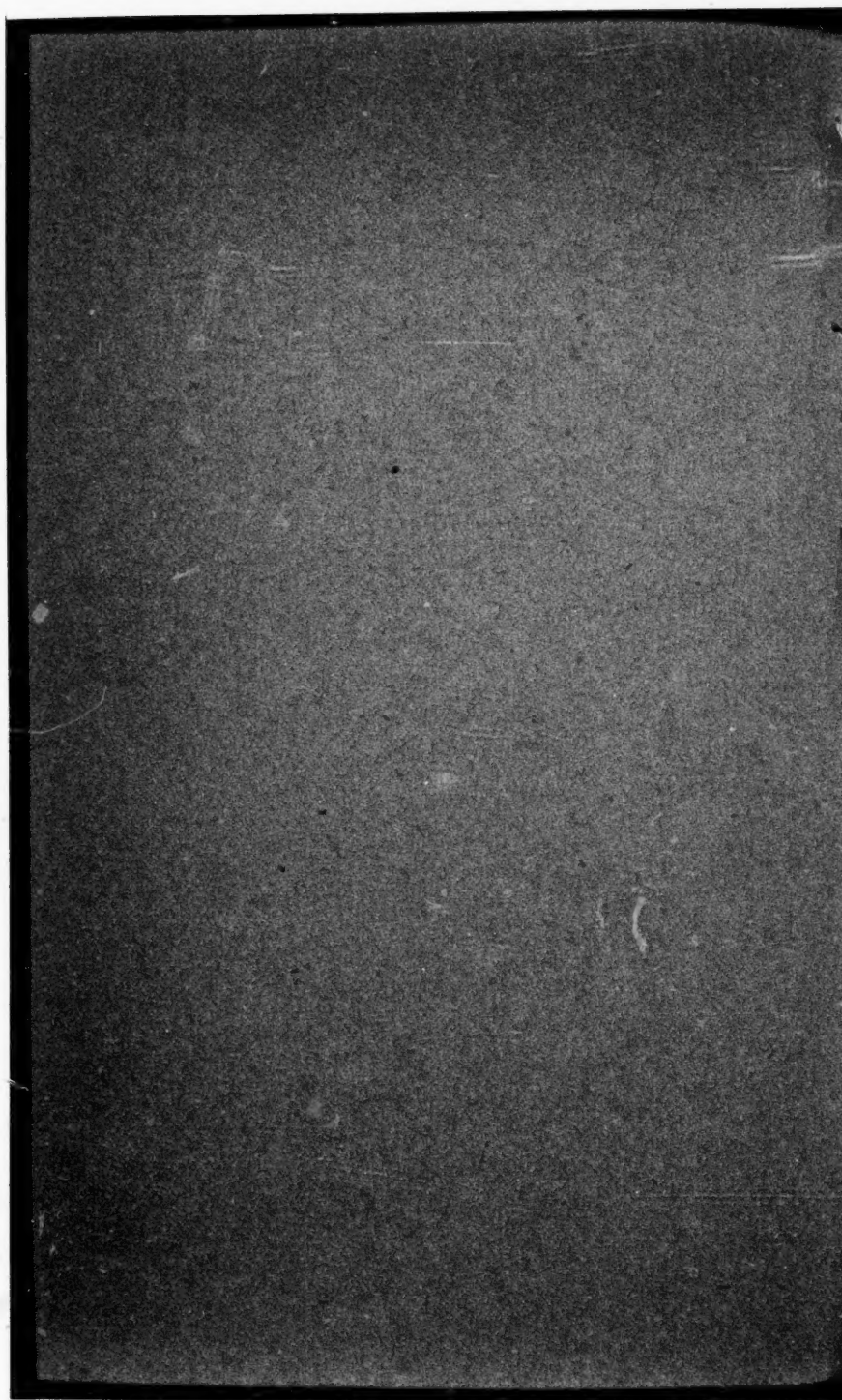
vs.

WILLIAM C. TAYLOR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED DECEMBER 11, 1906.

(21,928.)



(21,928.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 702.

CASSIUS B. THOMAS, WILLIAM D. EDDY, AND EDGAR
D. STARBUCK, PLAINTIFFS IN ERROR,

vs.

WILLIAM C. TAYLOR,

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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a In the Court of Appeals of the State of New York.

WILLIAM C. TAYLOR, Respondent,

vs.

CASSIUS B. THOMAS, WILLIAM D. EDDY, and EDGAR D. STARBUCK,
Appellants.

Case on Appeal.

Rockwood & Scott, Attorneys for Appellants, 378 Broadway,
Saratoga Springs, N. Y.

Hon. Edgar T. Brackett, Attorney for Respondent, Town Hall,
Saratoga Springs, N. Y.

1 In the Supreme Court of the State of New York, Appellate
Division, Third Department.

Supreme Court, Saratoga County.

WILLIAM C. TAYLOR, Respondent,

vs.

CASSIUS B. THOMAS, WILLIAM D. EDDY, and EDGAR D. STARBUCK,
Appellants.

Statement Required by Rule 41.

This action was commenced on the 10th day of December, 1904,
by service of the summons that day upon the defendant Cassius B.
Thomas.

The complaint was served on the 10th day of December, 1904.

The answer was served on the 10th day of July, 1905.

The names of the parties are given in full above and there has
been no change in the parties pending the suit.

2 Supreme Court.

WILLIAM C. TAYLOR, Plaintiff,

vs.

CASSIUS B. THOMAS, WILLIAM D. EDDY, and EDGAR D. STARBUCK.
Defendants.

Notice of Appeal to Appellate Division.

Please take notice, that the above named defendants hereby ap-
peal to the Appellate Division of the Supreme Court, for the Third
Department, from the judgment of this Court, entered herein in
the office of the Clerk of the County of Saratoga, on the 1st day of
August, 1907, whereby it was adjudged that the plaintiff recover

of said defendants the sum of Five Thousand Seven Hundred Ninety-nine Dollars and Nineteen Cents (\$5,799.19); and the said defendants appeal from each and every part of said judgment, as well as from the whole thereof. Such appeal is taken both upon questions of law and upon facts.

Dated August 27th, 1907.

ROCKWOOD & SALISBURY,
Attorneys for Defendants,
378 Broadway, Saratoga Springs, N. Y.

To the clerk of Saratoga County;
And to Hon. Edgar T. Brackett, Attorney for Plaintiff.

Judgment Roll.

Supreme Court, Saratoga County.

WILLIAM C. TAYLOR

vs.

CASSIUS B. THOMAS, WILLIAM D. EDDY, and EDGAR D. STARBUCK.

Complaint.

The plaintiff complains of the defendants and avers that during all the times hereinafter mentioned, The Citizens National Bank was a domestic corporation organized under the Banking Laws of the United States, engaged in the business of maintaining a national bank, the principal place of business of which, during all said times was in the Village of Saratoga Springs, Saratoga County, N. Y., said bank being subject to all the laws of the United States with respect to the regulation of the banking business carried on by a National Bank, and during all said times the defendants were members of the Board of Directors of said Bank, with all the powers and subject to all the duties granted to, and imposed upon, such position by law, and during all said times one John H. De Ridder, then a resident of the Village of Saratoga Springs was the cashier of said Bank, with all the powers and subject to all the duties imposed upon that position by law.

That on or about the 6th day of April, 1904, in pursuance of a call of the Comptroller of the Currency made therefor, said John H. De Ridder, such cashier, made and verified a report of the condition of said Citizens National Bank at the close of business on the 28th day of March, 1904, and, as required by the Statute in such case made, the correctness of said report was attested by the defendants herein, who were, as aforesaid, at said time directors

4 of said Citizens National Bank, three of which directors were required by law to attest said report, and said report was thereupon published, as required by the National Banking Act; that among other things, said report, the correctness of which was thus attested by the defendants, stated that the capital stock of said Bank paid in was \$100,000; that said Bank had a surplus of \$50,000 and undivided profits of \$13,456.75, and by attesting said report, the defendants certified and represented that the same was correct.

That thereafter, and in or about the early part of the month of June, 1904, the attention of the plaintiff was called to the stock of said bank as an investment, and believing the representations made in said report, thus attested, to be true, and relying upon the same, the plaintiff thereupon purchased thirty shares of said stock and paid therefor the sum of \$160 per share, in all the sum of \$4,800, and had the statements contained in said report been true, as certified by the defendants, said stock would have been worth said sum, or more, and would have been a valuable and safe investment for the plaintiff, for the amount for which he thus purchased the same, and except for said statement thus attested to be correct by the defendants, and if he had not relied upon and believed the same, the plaintiff would not have made such purchase of said stock.

And the plaintiff further avers that the statement thus made in said report thus published by said Citizens National Bank and verified by the said John H. De Ridder, as aforesaid, and attested by the defendants to be true, were false in the following particulars,

among others, to-wit; said bank had no surplus fund of \$50,000, nor any other sum, nor did it have undivided profits of \$13,456.75 nor of any other sum; the capital stock of said bank was not in existence and unimpaired to the amount of \$100,000, and on the contrary said capital had been so impaired that the same was practically wiped out, and there was of the same remaining not to exceed \$10,000, if so much; that the banking house and furniture and fixtures of said bank were not of the value of \$33,000 nor of any other sum greater than \$10,000, if so much, and there were many other particulars in which said report was incorrect and false; that said statements being thus false, the stock of said Citizens National Bank was without any value whatever, or did not have a value to exceed ten per cent. of its face, at the time the defendants attested said report, and when the same was published, nor at the time the plaintiff made said purchase of said stock, nor was said stock ever after worth a greater sum, if so much, until the payment of the assessment thereupon, as hereinafter stated.

That thereafter such proceedings were duly had that the stockholders of said bank authorized and ordered an assessment of one hundred per cent. to be made upon the capital stock thereof, as was by law provided could be done, and said assessment was approved and ordered by the Comptroller and thereupon the plaintiff, in order to save his said stock from sale, and as he was required to do in order to save the same, paid said assessment of one hundred per cent. upon said stock to said bank and by such payment saved said sale of said stock and still continued to own the same, and thereby said stock was increased in value by the amount of \$3,000, the sum thus paid by the plaintiff as such assessment.

And the plaintiff further avers upon information and belief that at the time the defendants attested said statement as correct, they knew that the same was not correct and was false, and said statement was thus attested by them with the intention of deceiving the public, and, among others, the plaintiff, and of deceiving any one who might deal with said bank, or in said stock, by causing them to believe that said bank was in a prosperous condi-

tion, that it had an unimpaired capital of \$100,000, a surplus of \$50,000, and undivided profits of \$13,456.75, that its banking house, furniture and fixtures were worth the sum of \$33,000, and that said stock was worth the sum of at least \$165 a share, and for the purpose of concealing the true condition of said bank, which was then wholly insolvent, and the stock of which was not worth to exceed as aforesaid; that the plaintiff was deceived thereby, and because thereof made said purchase of said stock, as aforesaid, and by reason thereof suffered loss to the amount of \$4,800, which he would not have done except for said acts of the defendants.

Wherefore, the plaintiff demands judgment against the defendants for the sum of Forty-eight Hundred Dollars, with interest thereon from the 1st day of July, 1904, besides costs.

(S'd)

EDGAR T. BRACKETT,

*Attorney for Plaintiff,**Town Hall, Saratoga Springs, N. Y.*

STATE OF NEW YORK,

County of Herkimer, ss:

7 William C. Taylor, being duly sworn, says that he is the plaintiff in the above entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

(S'd)

WILLIAM C. TAYLOR.

Subscribed and sworn to before me this 3^d day of Dec., 1904.

[L. s.]

(S'd)

J. E. RICHARDSON,

*Notary Public.**Answer.*

Supreme Court, Saratoga County.

WILLIAM C. TAYLOR, Plaintiff,

vs.

CASSIUS B. THOMAS, WILLIAM D. EDDY and EDGAR D. STARBUCK,
Defendants.

The defendants, answering the complaint of the plaintiff herein.

First. Admit that at the times mentioned in the complaint the Citizens National Bank of Saratoga Springs, N. Y., was a banking corporation having its principal place of business at Saratoga Springs, New York, and that it was subject to all the laws of the United States with respect to the regulation of the banking business carried on by a national bank.

8 Second. Admit that during all of the times mentioned in the complaint the defendants were members of the Board of Directors of said bank, with all the powers and subject to all the duties granted to and imposed upon such position by law.

Third. Admit that during all of said times one John H. De Ridder, was the cashier of the said bank, with all the powers and subject to all the duties imposed upon that position by law.

Fourth. Admit that on or about the 6th day of April, 1904, in pursuance of a call of the Comptroller of the Currency of the United States of America, made therefor, said John H. De Ridder, as such cashier, made and verified a report of the condition of said bank as it was at the close of business on the 28th day of March, 1904, and that, as required by the statute in such case made and provided, the said report was marked "Correct—Attest:" and signed by these defendants, C. B. Thomas, E. D. Starbuck and W. D. Eddy, who were at said time directors of said bank.

Fifth. Admit that said report was thereupon published, as required by the National Banking Act.

Sixth. Admit that said report stated the capital stock of said bank, paid in, to be one hundred thousand dollars (\$100,000.00); that said bank had a surplus fund of fifty thousand dollars (\$50,000.00), and undivided profits of thirteen thousand, four hundred and fifty-six and 75-100 dollars (\$13,456.75). A copy of said report, so marked "Correct—Attest" and signed by these defendants, is hereto annexed, marked "Schedule A," and is referred to the same as if herein written at length; and these defendants, upon information and belief, aver the fact to be that said report, so signed by them, was at the time it was made a correct and true transcript from the books of said bank, and that the same was not falsified in any respect whatever.

Seventh. Allege that they have no knowledge or information thereof sufficient to form a belief, that in or about the early part of the month of June, 1904, the attention of the plaintiff was called to the stock of said bank as an investment, and that, believing the representations made in said report, thus attested, to be true, and relying upon the same as stated in the complaint, the plaintiff thereupon purchased thirty (30) shares of said stock and paid therefor the sum of one hundred and sixty dollars (\$160.00) per share, or in all the sum of four thousand eight hundred dollars (\$4,800.00).

Eighth. Allege that they have no knowledge or information thereof sufficient to form a belief, that said plaintiff relied upon said statement or believed the same, or that he would not have made such purchase of said stock but for said statement; and allege that they have no knowledge or information thereof sufficient to form a belief, that said statement was ever in fact called to the attention of said plaintiff or of anyone acting for him.

Ninth. Deny that the statements thus made in said report thus published by said Citizens National Bank and verified by the said John H. De Ridder, as such cashier, and signed by these defendants, were false in any particular, and, upon information and belief, aver the fact to be that said statement, in each and every particular, and in each item thereof, was a correct and true transcript and statement taken from the books of said bank, and that said defendants fully believed the same to be such true and correct statement at the time it was made and signed by them.

10 Tenth. Deny that the stock of the said Citizens National Bank of Saratoga Springs, N. Y., was without any value whatever or did not have a value to exceed ten per cent: of its face, at the time the defendants signed said report and when the same was published, and at the time the plaintiff claims to have made said purchase of said stock and deny that said stock was never after that time worth a greater sum, if so much, until the payment of the assessment thereupon, as claimed in the complaint.

Eleventh. Admit that thereafter such proceedings were had that the stockholders of said bank authorized and ordered an assessment of one hundred per cent., to be made upon the capital stock thereof, and that said assessment was approved and ordered by the Comptroller of the Currency; and admit that said plaintiff paid his assessment upon the same.

Twelfth. Deny that at the time the defendants signed said report, or at any other time, they knew that said statement was not correct and false, and that said statement was thus attested by them with the intention of deceiving the public and, among others, the plaintiff, and of deceiving anyone who might deal with said bank or in said stock, as alleged in the complaint; and, upon information and belief, aver the fact to be that said report, so signed by them, complied in every respect with the rules, regulations and requirements of the Comptroller of the Currency of the United States of America, and was a true and correct statement of the condition of said bank as shown by the books thereof.

11 Thirteenth. Deny that the plaintiff was, as alleged in the complaint or at any other time, deceived by any statement or representation of these defendants, or that he suffered loss to the amount of four thousand eight hundred dollars (\$4,800.00), or of any other amount, by reason of any act of omission or commission on the part of these defendants or anyone representing them.

Fourteenth. Except as hereinbefore admitted or controverted, these defendants deny each and every allegation in said complaint contained.

II.

For a further and separate answer and defense to the alleged cause of action set out in the complaint, these defendants aver that there is a defect of parties defendant herein in that, as it appears upon the face of the complaint, said John H. De Ridder should be joined as a party defendant herein, he being the cashier of said bank at the time said report was made and having verified the same, as hereinbefore alleged.

Wherefore, the defendants demand judgment that the said complaint be dismissed, with costs.

ROCKWOOD & SALISBURY,
Defendants' Attorneys.

Office and Post Office Address, 378 Broadway, Saratoga Springs,
N. Y.

STATE OF NEW YORK,
County of Saratoga, ss:

Cassius B. Thomas, being duly sworn, deposes and says that he is one of the defendants in this action; that he has read the foregoing answer and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

(S'd)

CASSIUS B. THOMAS.

Subscribed and sworn to before me this 8th day of July, 1905.

(S'd)

HARRY F. THOMAS,

Notary Public.

Personal service of a copy of the within answer is admitted this 10th day of July, 1905.

(S'd)

EDGAR T. BRACKETT,

Attorney for Plaintiff.

12a

SCHEDULE A.

Bank Officers are requested to use the following form for printers' "copy."

Enter Charter Number of Bank here.

No. 2615.

Report of the Condition of The Citizens' National Bank at Saratoga Springs, in the State of New York, at the Close of Business, March 28, 1904.

Resources.	Dollars.
Loans and Discounts.....	633,126 38
Overdrafts, secured and unsecured.....	2,665 77
U. S. Bonds to secure circulation.....	100,000 00
U. S. Bonds to secure U. S. Deposits.....	160,000 00
Other bonds to secure U. S. Deposits.....
U. S. Bonds on hand.....
Premiums on U. S. Bonds.....	20,800 00
Bonds, securities, etc.....	225,342 47
Banking house, furniture, and fixtures..	33,000 00
Other real estate owned.....	34,906 72
Due from National Banks (not reserve agents).....	1,114 84
Due from State Banks and Bankers.....	8,643 46
Due from approved reserve agents.....	76,120 17
Revenue stamps.....	308 89
Checks and other cash items.....	244 50
Exchanges for clearing house.....	1,495 52
Notes of other National Banks.....	8,370 00
Fractional paper currency, nickels, and cents.....	1,763 82

Lawful Money Reserve in Bank, viz:

Specie.....	\$29,780 10	
Legal-tender notes.....	33,492 00	
		63,272 10
Redemption fund with U. S. Treasurer (5% of circulation).....		5,000 00
Due from U. S. Treasurer, other than 5% redemption fund.....		
Total.....		1,376,174 64

Liabilities.

Dollars.

Capital stock paid in.....		100,000 00
Surplus fund.....		50,000 00
Undivided profits, less expenses and taxes paid.....		13,456 75
National Bank notes outstanding.....		95,800 00
State Bank notes outstanding.....		
Due to other National Banks.....		31,418 68
Due to State Banks and Bankers.....		613 55
Due to Trust Companies and Savings Banks.....		2,814 10
Due to approved reserve agents.....		
Dividends unpaid.....		25 00
Individual deposits subject to check.....	\$225,788 15	
Demand certificates of deposit.....	686,256 18	
Time certificates of deposit.....		
Certified checks.....		
Cashier's checks outstanding.....	2 23	
United States deposits.....	160,000 00	
		1,072,046 56
Deposits of U. S. disbursing officers.....		
Bonds borrowed.....		
Notes and bills rediscounted.....		10,000 00
Bills payable, including certificates of deposit for money borrowed.....		
Liabilities other than those above stated.....		
Total.....		1,376,174 64

STATE OF NEW YORK,

County of Saratoga, ss:

I, John H. De Ridder, Cashier of the above named bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

(Sd.)

J. H. DE RIDDER, *Cashier.*

Correct—Attest:

(Sd.) C. B. THOMAS,
 “ E. D. STARBUCK,
 “ W. D. EDDY,

Directors.

Subscribed and sworn to before me this 6th day of April, 1904.

(Sd.)

W. H. WATERBURY,

Notary Public.

13

Requests to Find.

Supreme Court, County of Saratoga.

WILLIAM C. TAYLOR, Plaintiff,

vs.

CASSIUS B. THOMAS, WILLIAM D. EDDY and EDGAR D. STARBUCK,
Defendants.

The defendants, Cassius B. Thomas, William D. Eddy and Edgar D. Starbuck, submit the annexed proposed findings of fact, which they deem established by the evidence herein, and proposed conclusions of law, which they desire and request be made.

Dated July 31st, 1907.

(S'd)

ROCKWOOD & SALISBURY,

Attorneys for Defendants,

378 Broadway, Saratoga Springs, N. Y.

The following requests were submitted to me several days after case disposed of.

C. C. V. K., J. S. C.

Findings of Fact.

1st. That at all of the times referred to in the complaint herein, and at the time of the trial of this action, the Citizens National Bank of Saratoga Springs, N. Y., was a domestic corporation organized under the banking laws of the United States and engaged in the business of maintaining a national bank, and having its principal place of business during all of said times in the Village of Saratoga Springs, Saratoga County, New York, and that said bank was subject to all of the rules of the United States with respect to the regulation of the banking business carried on by a national bank (see complaint, fol. 2, and Answer, paragraph "First").

Yes.

C. C. V. K., J. S. C.

2nd. That during all of the times mentioned in the complaint, and at the time of the trial of this action, the said defendants were members of the Board of Directors of said bank, with all the powers and subject to all the duties granted to and imposed upon such position by law, and that during all of said times one John H. De Ridder, then a resident of the Village of Saratoga Springs, was the cashier of said bank, with all the powers and subject to all the duties imposed upon the position by law (See Complaint, fols. 2 and 3, and Answer, paragraphs "Second" and "Third").

Yes.

C. C. V. K., J. S. C.

3rd. That on or about the 6th day of April, 1904, in pursuance of a regular call of the Comptroller of the Currency made therefor,

said John H. De Ridder, said cashier, made and verified a report of the condition of said Citizens National Bank at the close of business on the 28th day of March, 1904, and as required by the Statute in such case made, the correctness of said report was attested by the defendants herein who were, as aforesaid, at said time directors of said Citizens National Bank, three of which directors were required by law to attest such report, and said report was thereupon published as required by the National Banking Act (see Complaint, fols. 3 and 4, and Answer, paragraphs "Fourth" and "Fifth").

Yes.

C. C. V. K., J. S. C.

15 4th. That a true copy of said report as issued, published and signed "Correct—Attest" by the defendants herein is annexed to the defendants' answer in this action, marked "Schedule A" (see Answer, paragraph "Sixth" and "Schedule A" of same).

Yes.

C. C. V. K., J. S. C.

5th. That prior to June 27, 1904, the plaintiff had not seen the said published statement of the condition of the Citizens National Bank at the close of business on March 28, 1904 (see Record, p. 19).

Yes.

C. C. V. K., J. S. C.

6th. That the plaintiff did not see the bank statement in question until after he had purchased the stock referred to in the complaint in this action (see Record, p. 19).

Yes.

C. C. V. K., J. S. C.

7th. That previous to the purchase of the stock referred to in the complaint herein by the said plaintiff, the said plaintiff did not ascertain or know anything about the loans and discounts of said bank (see Record, p. 20).

Except as stated to him by Waterbury.

Yes.

C. C. V. K., J. S. C.

8th. That previous to buying the said thirty shares of stock of said Citizens National Bank the plaintiff did not write a letter to any officer, employee or agent of the said bank to find out about the condition of its affairs (see Record, p. 23).

Yes.

C. C. V. K., J. S. C.

16 9th. That the said statement of its condition on March 28, 1904, as published by the said Citizens National Bank and marked "Correct—Attest" by said defendants, was a true statement of such condition as shown by the books of the bank at that time (see Record, pp. 45 and 46).

Yes, except as modified and explained in the decision and memorandum.

C. C. V. K., J. S. C.

10th. That the plaintiff did not personally see the report of the said condition of the Citizens National Bank on March 28, 1904, prior to the time of the purchase of the stock in question (see Record, p. 7).

See above "5" & "6."

11th. That on or about June 1st or 2nd, 1904, plaintiff purchased thirty shares of the capital stock of the Citizens National Bank (see Record, p. 32).

Yes.

C. C. V. K., J. S. C.

12th. That the plaintiff did not personally purchase the said shares of stock, but that they were sold to him by his brother-in-law, William R. Waterbury (see Record, pp. 6-7).

No.

C. C. V. K., J. S. C.

He purchased through his brother-in-law as his agent.

C. C. V. K.

13th. That the plaintiff in making his said purchase of said stock relied upon statements made to him by the said William R. Waterbury and accepted the judgment of the said Waterbury as to the matter wholly aside from any information which Waterbury had or could have gleaned from the said published report of the condition of the bank on March 28, 1904 (see Record, p. 20).

No.

C. C. V. K., J. S. C.

14th. That the plaintiff first talked with the said Waterbury about the matter at Ilion, N. Y., on May 24, 1904, when Waterbury said to him in substance that "he had a chance to buy some thirty shares of Citizens Bank stock for 160, and that he considered it a good investment; that it was worth 160 or more. It was paying four per cent. and five per cent. semi-annually as interest and he could buy twenty or thirty shares; that he had a lot of the stock himself and he called it worth 175, and he thought it was a good thing for Taylor to buy" (see Record, p. 16).

Yes.

C. C. V. K., J. S. C.

15th. That in said conversation between Waterbury and Taylor nothing was said by Waterbury to Taylor concerning the said published bank statement (see Record, pp. 16 and 17).

No.

C. C. V. K., J. S. C.

16th. That in the said conversation on May 24, 1904, Waterbury did not say where he could buy the said stock or who he could buy it from (see Record, p. 17).

Do not recall.

17th. That the plaintiff had not spoken to Waterbury about the purchase of the stock previous to Waterbury's speaking to the plaintiff about it on May 24, 1904, and the entire matter was done at the instance of Waterbury (see Record, pp. 17 and 27).

Waterbury suggested the purchase.

C. C. V. K., J. S. C.

18 18th. That on May 24, 1904, the plaintiff did not have any money of his own awaiting investment (see Record, p. 17).

Do not recall.

19th. That prior to the purchase of the stock in question the plaintiff did not have a conference of any kind with the defendants Starbuck, Eddy or Thomas, and that said plaintiff did not have any conversation with any of the said defendants until June 27, 1904 (see Record, p. 18).

Yes.

C. C. V. K., J. S. C.

20th. That Waterbury did not occupy any position of trust or employment by Taylor, or over which Taylor had charge directly or indirectly, nor was Waterbury connected with him in any business in any way (see Record, p. 21).

21st. That plaintiff did not pay Mr. Waterbury anything for his services in connection with the purchase of the stock, nor was Waterbury in the employ of the plaintiff (see Record, p. 21).

Yes, he was plaintiff's agent without compensation.

C. C. V. K., J. S. C.

22nd. That the plaintiff's checks for the payment of the stock purchased were made payable to Waterbury (see Record, p. 23).

Do not recall.

23rd. That the stock in question was purchased of one Brownell, but the plaintiff did not have any communication with Brownell except such as may have been had through Waterbury (see Record, p. 23).

Yes.

C. C. V. K., J. S. C.

19 24th. That previous to the purchase of the said stock, Waterbury had been a stockholder of the Citizens National Bank for twelve or thirteen years and had received dividends regularly, and had never heard the standing of the bank called in question up to that time (see Record, p. 34).

Yes.

C. C. V. K., J. S. C.

25th. That there is no evidence to show that Waterbury did not sell his own stock, except Waterbury's own statement (see Record, p. 24).

26th. That in May, 1904, Waterbury was associated in business with the defendant Thomas (see Record, p. 35); and that although at the time of the purchase Thomas was president of the bank (see Record, p. 35), Waterbury made no inquiry of him regarding the value of the stock (see Record, p. 36).

Do not recall.

C. C. V. K., *J. S. C.*

27th. That previous to the purchase of the stock in question, Waterbury did not make any inquiry concerning it or its value of the defendants Thomas, Eddy or Starbuck.

Do not recall.

C. C. V. K., *J. S. C.*

28th. That the plaintiff conferred frequently with Waterbury about business matters and made investments upon Waterbury's personal judgment (see Record, p. 18).

Do not recall such proof.

C. C. V. K., *J. S. C.*

29th. That in purchasing the stock in question, the plaintiff relied entirely upon the opinion of Waterbury as to the value of the stock, and that Waterbury's opinion concerning the same was fully and positively expressed before he had seen the bank statement referred to in the complaint.

No.

C. C. V. K., *J. S. C.*

30th. That the plaintiff did not rely upon the said published bank statement in making the said purchase of the stock in question, but there is no sufficient proof that the said bank statement was ever called to the attention of the plaintiff as alleged in folios four and five of the complaint.

No.

C. C. V. K., *J. S. C.*

31st. That the statements made in the said published report were not false in any part, but that said statements in each and every particular and in each item thereof were true and correct transcripts and statements taken from the books of the bank.

No.

C. C. V. K., *J. S. C.*

32nd. That said defendants fully believed the said published bank statement to be such true and correct statement and transcript from the books of the bank at the times it was marked "correct attest" by them.

Probably so.

C. C. V. K., *J. S. C.*

33rd. That the said statement was not signed "correct attest" by the said defendants with the intention of deceiving the public and,

among others, the plaintiff, or of deceiving any one who might deal with said bank or with said stock as alleged in the complaint.

No.

C. C. V. K., J. S. C.

21 34th. That said report of the condition of said bank on March 28, 1904, so signed "correct attest" by said defendants, complied in every respect with the rules, regulations and requirements of the Comptroller of the Currency of the United States of America, and was a true and correct statement of the condition of said bank as shown by the books thereof at said time.

See request of law 13."

35th. That the said plaintiff was not, at the time alleged in the complaint or any other time, deceived by any statement or representation of said defendants.

No.

C. C. V. K., J. S. C.

36th. That the said plaintiff has not suffered loss in any amount by reason of any act of omission or commission or of any other act, affirmative or otherwise, on the part of these defendants or any one representing them.

No.

C. C. V. K., J. S. C.

37th. That said plaintiff in purchasing said thirty shares of bank stock did not rely upon the said published bank statement, but relied entirely upon the judgment and opinion of William R. Waterbury as to the value of the same.

No.

C. C. V. K., J. S. C.

38th. That on the 30th day of June, 1904, an assessment of one hundred dollars per share had been ordered by the stockholders under the direction of the Comptroller of the Currency, which was subsequently paid, and the plaintiff paid his assessment prior to the commencement of this action, and that the proceedings

22 to make that a binding assessment were duly taken.

Yes.

C. C. V. K., J. S. C.

39th. That notice from the Comptroller of the Currency to the said bank that its capital stock had become impaired to the amount of One Hundred Thousand Dollars, and that under the provisions of Section 5205 of the U. S. Revised Statutes such deficiency in the capital stock had to be made good by assessment upon the stockholders pro rata to the amount of the capital stock held by each, or the bank would be placed in liquidation, was received by the bank June 27, 1904. (See Record, p. 15.)

Yes.

Unless error in date or section number.

C. C. V. K., J. S. C.

40th. That at least thirty days prior to the 28th of March, 1904, the Comptroller of the Currency had called the attention of the directors of the bank, by letter, to the situation of the bank and that items (the detail to be furnished by Senator Brackett, the

Do not find as to this.

C. C. V. K.

same being in his possession and not having been printed in the record) amounting to \$194,107.02 must be regarded as doubtful assets and that immediate steps should be taken to collect them or remove them out of the bank, and that defendants had knowledge of such letter from the Comptroller of the Currency at the time that they attested the report (see Record, p. 42).

Yes.

C. C. V. K., J. S. C.

41st. That the defendants did take steps to collect said doubtful assets and that of the said amount of \$194,107.02, last above
23 referred to, \$97,107.02 has been realized, leaving an amount
of \$97,000 which has never been realized. (Record, p.
42).

Yes.

C. C. V. K., J. S. C.

42nd. That the said items in the statement had not been charged off prior to the published statement of March 28, 1904, and said items were carried upon the books and appear in the said statement and were of the sum of \$194,107.02 (see Record, p. 46.)

Yes.

C. C. V. K.

43rd. That this action is not brought to enforce a liability of the defendants as directors of a national bank, in accordance with the provisions of the National Banking Act, but is a common law action for deceit.

Yes.

C. C. V. K., J. S. C.

Conclusions of Law.

1st. That Section 5239 of the Revised Statutes of the United States provides as follows, to-wit:

"If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents or servants of the association to violate any of the provisions of this title, all the rights, privileges and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district, or territorial court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association

“shall be declared dissolved. And in case of such violation, every
 “director who participated in or assented to the same shall be
 24 “held liable in his personal and individual capacity for all
 “damages which the association, its shareholders, or any
 “other person, shall have sustained in consequence of such violation.”
 Have not compared Statute.

That inasmuch as it is expressly alleged in the complaint in this action that the Citizens National Bank was organized under the National Banking Act, and that the defendants at all of the times herein stated were officers and directors of said bank, the said defendants are entitled to an immunity in respect to their liability, if any, under said Section 5239 of the Revised Statutes of the United States.

2nd. That Section 5211 of the Revised Statutes of the United States provides as follows:

“Every association shall make to the Comptroller of the Currency not less than five reports during each year, according to the
 “form which may be prescribed by him, verified by the oath or
 “affirmation of the president or cashier of such association and
 “attested by the signature of at least three of the directors. Each
 “such report shall exhibit, in detail and under appropriate heads,
 “the resources and liabilities of the association at the close of business on any past day by him specified; and shall be transmitted to
 “the Comptroller within five days after the receipt of a request or
 “requisition therefor from him and in the same form in which it
 “is made to the Comptroller, shall be published in a newspaper published in the place where such association is established, or if there
 “is no newspaper in the place, then in the one published nearest
 25 “thereto in the same county, at the expense of the association; and such proof of publication shall be furnished as
 “may be required by the Comptroller. The Comptroller shall
 “also have power to call for special reports from any particular
 “association whenever in his judgment the same are necessary in
 “order to a full and complete knowledge of its condition.”

Have not compared Statute.

3rd. That Section 5239 of the Revised Statutes of the United States affords the exclusive rule by which to measure the right to recover damages from directors of a national bank based upon a loss alleged to have resulted solely from the violation by such directors of a duty expressly imposed upon them by a provision of the act.

4th. That Section 5239 of the Revised Statutes of the United States comprehends all the express commands to do or not to do, as to directors, contained in the National Bank Act, and also specifies the nature of the conduct of directors from which their civil liability for violation of such commands may arise; that it thus results that liability cannot be entailed upon them by exacting a different and higher standard of conduct as regards such commands than that established by the Statute without depriving directors of an immunity conferred upon them. That the measure of responsibility concerning the violation by directors of express commands of the National Bank Act is exclusively governed by the specific provisions on the subject contained in that Act.

5th. That the civil liability of national bank directors in respect to the making and publishing of the official reports of the condition of the bank, being a duty solely enjoined by the statute and
 26 governed by the national bank act, is exclusive because of the rule that where a statute creates a duty and prescribed a penalty for non-performance, the rule prescribed in the statute is the exclusive test of liability.

6th. That the national bank act imposes upon directors of a national bank duties which would not rest upon them at common law, and that among such duties is the furnishing to the Comptroller of the Currency reports concerning the condition of the bank and the publication thereof.

Yes.

C. C. V. K., J. S. C.

7th. That the common law action of deceit first sought to be maintained in this action, cannot be maintained; the plaintiff's remedy, if any being exclusively governed by, and the defendants, liability tested by the provisions of Section 5239 of the Revised Statutes of the United States known as the National Banking Act.

No.

C. C. V. K., J. S. C.

8th. That this Court has no jurisdiction to render a judgment against the defendants based upon the complaint and proof in this action.

No.

C. C. V. K., J. S. C.

9th. That there were no verbal misrepresentations shown to have been made by the defendants to the plaintiff or to any one acting for the plaintiff.

Yes, if you mean oral.

C. C. V. K., J. S. C.

10th. That there is no sufficient proof of the agency of William R. Waterbury to act for or to represent the plaintiff.

No.

C. C. V. K., J. S. C.

27 11th. That the plaintiff has failed to make out a cause of action against the defendants in this action; that there is an entire want of proof of actual or intentional fraud of any kind or character upon which this action could be based. That there is no proof before the Court that the defendants or any one acting for them or under their direction made any false entries in the report of the bank's condition.

No.

C. C. V. K., J. S. C.

12th. That there is an entire absence of any evidence showing fraud or deceit on the part of any of the defendants.

No.

C. C. V. K., J. S. C.

13th. That no evidence has been adduced to show that the bank's statement is true or not a true transcript of record of the books of the bank.

14th. The defendant's motion for a dismissal of the complaint, made at the commencement of the trial, should have been granted for the reasons specified under paragraph "First" thereof.

No.

C. C. V. K., J. S. C.

15th. That the plaintiff, upon his own proof, was guilty of contributory negligence in the purchase of said stock, in that he purchased said stock in June 1904, relying upon statements published of the condition of said bank on March 28, 1904, or over two months prior to the purchase of his stock, and there is no allegation in the complaint that the condition of the bank in June 1904, at the time he purchased his stock, was the same as it was on March 28, 1904; wherefore defendants' motion for a dismissal of the complaint, made

28 at the commencement of the trial, should have been further granted for the reasons specified in paragraph "Third" thereof. (Record, pp. 2 and 3).

No.

C. C. V. K., J. S. C.

16th. That it is conceded herein by the plaintiff that this is not an action to recover upon any liability stated in the National Banking Act against a director or officer of a national bank.

Yes.

C. C. V. K., J. S. C.

17th. That this action is not brought to enforce a liability of the defendants as directors of a national bank, in accordance with the provisions of the National Bank Act, but is a common law action for deceit.

Yes.

C. C. V. K., J. S. C.

18th. That defendants' motion for a non-suit and a dismissal of the complaint, made at the close of the plaintiff's case, should have been granted for the reasons specified at pages 42 and 44 of the record.

No.

C. C. V. K.

19th. That the defendants are entitled to judgment for the dismissal of the complaint with costs.

No.

C. C. V. K., J. S. C.

ROCKWOOD & SALISBURY,
Attorneys for Defendants,
378 Broadway, Saratoga Springs, N. Y.

The above requests to find were submitted pursuant to consent of Hon. Edgar T. Brackett, plaintiff's Attorney, endorsed thereon in these words:

"I consent that Justice pass on these, if he wants to, as though before decision.

"E. T. B."

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Decision.

At a Trial Term of the Supreme Court, Held in and for the County of Saratoga, Beginning February 4th, 1907.

Present: Hon. Charles C. Van Kirk, Justice.

Supreme Court, Saratoga County.

WILLIAM C. TAYLOR

against

CASSIUS B. THOMAS, WILLIAM D. EDDY and EDGAR D. STARBUCK.

This case having been regularly brought on to be heard before me without a jury, having heard the proofs offered by the parties and after due consideration, I find and decide as follows:

Findings of Fact.

1. That, during the year, 1904, the Citizens National Bank of Saratoga Springs, N. Y., was a national banking association, organized under the national banking law of the United States, and engaged in business in the village of Saratoga Springs, Saratoga County, New York.

2. That, during the year 1904, to a time subsequent to June 20th, 1904, the defendants were stockholders and directors of the said bank.

3. That on April 6th, 1904, pursuant to a call of the Comptroller of the Currency, a report of the standing of the bank, as of the close of business March 28th, 1904, was made in regular form and was duly attested to be correct by each of the defendants, and was duly published as required by law, on or about the 8th day of April, 1904.

4. That a copy of said report is annexed to the answer
30 herein, marked "Schedule A"; and, among other things, it shows that the capital stock, fully paid in, was \$100,000; that the surplus was \$50,000, and that the undivided profits were \$13,-456.75.

5. On or about May 24th, 1904, William R. Waterbury, a brother-in-law of the plaintiff, spoke to the plaintiff concerning the purchase of certain shares of the stock of said bank. He informed the plaintiff that he considered the stock a good purchase; he told plaintiff the substance of the report of April 6th, the amount of the capital stock, the surplus and the undivided profits, referring at the time to the said report, which was the last report of the bank

then issued. He also informed the plaintiff what dividends the bank had been paying and his own estimate of the value of the stock, and that the certificates of stock could be purchased for \$135 per share.

6. On or about the 2nd day of June, 1904, the plaintiff mailed to Mr. Waterbury checks to the amount of \$4,800, with instructions to purchase the bank stock. Mr. Waterbury purchased 30 shares of the said stock for the sum of \$160 per share and the certificates were delivered to the plaintiff on or about the 27th day of June, 1904.

7. The plaintiff, at the time of the purchase of the said stock, had never seen the said published report, and relied upon the statement of Mr. Waterbury and believed and relied upon the fact that said report did show said items as reported to him by Mr. Waterbury.

8. Prior to the time that Mr. Waterbury saw the plaintiff concerning the purchase of the stock, Mr. Waterbury had seen and examined the said report of April 6th, 1904, and he believed it to be true when he examined it and when he communicated the information to the plaintiff; and at the time he purchased the stock in behalf of plaintiff; and, in making said purchase, he relied upon the contents of the report as attested by the defendants.

9. Had the statements contained in the said report been true, the stock thus purchased by the plaintiff would have been worth the sum of \$160 per share, or \$4,800, which was the amount he paid therefor.

10. The said report and the statements therein were untrue in the following items, namely: Upon the close of business March 28th, 1904, the bank did not have undivided profits in the sum of \$13,453.75, or in any sum; it did not have a surplus in the sum of \$50,000, or in any sum; it did not have a capital stock unimpaired in the sum of \$100,000; the capital stock at said time being in fact lost.

11. On or about the 27th day of June, 1904, the said bank received notice from the Comptroller that its capital was impaired in the sum of \$100,000, and must be made good by assessment or the bank would be placed in liquidation. Directly thereafter an assessment was regularly made of 100 per cent. on the capital stock of said bank, and thereafter, but before this action was begun, the plaintiff paid his assessment in the sum of \$3,000, being the sum assessed upon his 30 shares of stock.

12. Between the 28th day of March, 1904, and the 28th day of June, 1904, there were no losses of consequence suffered by the bank. The financial condition of the bank was substantially the same upon the 28th day of June, 1904, that it was upon the 28th day of March, 1904.

13. On or about March 1st, 1904, the Comptroller, in writing, informed the bank that items carried as assets upon the books of the bank to the amount of more than \$194,000, were doubtful and that immediate steps must be taken to collect them or they be removed from the books of the bank. These items appeared in the report dated April 6th, 1904. This notice from the Comptroller was known to the defendants prior to the attesting of the

report dated April 6th, 1904, and the defendants also knew that the items mentioned in the notice to the amount of \$194,000, had not been removed from the books of the bank.

14. That, at the time the defendants attested the said report to be correct, they knew or had reason to believe that it was not correct, and they either knew that the statement was untrue or they willfully refused to make an examination, and attested the report recklessly.

15. The said report was so attested by the defendants with the intention of causing the public to believe that said bank was in the financial condition shown in the report, that it had an unimpaired capital, and surplus and undivided profits in the sum of \$63,000, when in fact the defendants knew, or had reason to believe, that said report was incorrect and untrue in the respects hereinabove stated.

16. That the plaintiff relied on said report and was deceived thereby; in reliance upon said report he purchased the said stock and by reason thereof has suffered a loss in the sum of \$4,800, the stock at the time of his purchase being of no value.

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Conclusions of Law.

I. The plaintiff is entitled to recover from the defendants the sum of Forty-eight Hundred Dollars, the difference between the value of the stock as it was in fact and the value as it would have been if the representations in said report had been true.

II. The plaintiff is entitled to judgment against the defendants for the sum of Forty-eight Hundred Dollars, with interest from July 1st, 1904, besides costs.

C. C. VAN KIRK, J. S. C.

Take Notice, the foregoing is a copy of the decision in the above entitled action, duly filed in the Saratoga County Clerk's office this day.

Dated August 1, 1907.

EDGAR T. BRACKETT,
Attorney for Plaintiff,
Town Hall, Saratoga Springs, N. Y.

To Messrs. Rockwood & Salisbury, Attorneys for Defendants.

Judgment.

Supreme Court, Saratoga County.

WILLIAM C. TAYLOR

vs.

CASSIUS B. THOMAS, WILLIAM D. EDDY and EDGAR D. STARBUCK.

The action having been tried by the court without a jury, and a decision having been made, directing judgment in favor of the plaintiff and against the defendants, for the sum of Forty-eight Hundred Dollars, with interest from July 1st, 1904,

34

besides costs; now on motion of Edgar T. Brackett, attorney for the plaintiff, it is adjudged that the plaintiff recover of the defendants the sum of Fifty-six Hundred and Eighty-eight Dollars damages, and a further sum of One Hundred and Eleven and 19-100 Dollars, costs, in all Fifty-seven Hundred and Ninety-nine and 19-100 Dollars.

(S'd)

GEO. H. WEST, *Clerk.*

Entered Aug. 1, 1907, 4:45 P. M.

Take Notice, That the foregoing is a copy of a judgment herein, this day duly entered in the Saratoga County Clerk's office.

Dated, Aug. 1, 1907.

EDGAR T. BRACKETT,
Attorney for Plaintiff,
Town Hall, Saratoga Springs, N. Y.

To Messrs. Rockwood & Salisbury, Attorneys for Defendants.

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Supreme Court, Saratoga County.

WILLIAM C. TAYLOR, Plaintiff,

vs.

CASSIUS B. THOMAS, WILLIAM D. EDDY, and EDGAR D. STARBUCK,
Defendants.

To Hon. Edgar T. Brackett, Attorney for the Plaintiff, Town Hall,
Saratoga Springs, N. Y.:

Please take notice, That the within notice of exceptions to the decision and findings and refusal of the Court herein has been filed in the office of the Clerk of the County of Saratoga, N. Y., this 7th day of August, 1907.

Dated August 7th, 1907.

Yours, &c.,

ROCKWOOD & SALISBURY,
Attorneys for the Defendants,
378 Broadway, Saratoga Springs, N. Y.

36 *Defendants' Exceptions to Decision and Refusals to Find.*

Supreme Court, Saratoga County.

WILLIAM C. TAYLOR, Plaintiff,

vs.

CASSIUS B. THOMAS, WILLIAM D. EDDY, and EDGAR D. STARBUCK,
Defendants.

The defendants, Cassius B. Thomas, William D. Eddy and Edgar D. Starbuck, hereby except to the decision of Mr. Justice Charles C. Van Kirk herein, filed in the office of the Clerk of the County of Saratoga on the 1st day of August, 1907, in the following particulars:

1st. To so much of the language of the fifth finding of fact as

reads as follows: "He told the plaintiff the substance of the report of April 6th, the amount of the capital stock, the surplus, and the "undivided profits, referring at the time to the said report, which "was the last report of the bank then issued," for the reason that said finding is not sustained by the evidence, and the evidence is contrary thereto, William C. Taylor testifying that the substance of the conversation between himself and William R. Waterbury on May 24, 1904, was as follows: "He said he had a chance to buy some thirty "shares of Citizens Bank stock for one hundred and sixty and he "considered it a good investment; that it was worth one hundred and "sixty or more; it was paying four and five per cent. semi-annually
37 "as interest, and he could buy twenty or thirty shares; that
"he had a lot of the stock himself and he called it worth
"one hundred and seventy-five and he thought it was a good
"thing for me to buy." (See Record, p. 16.)

2nd. To that part of the seventh finding of fact which reads as follows: "The plaintiff * * * relied upon the statement of Mr. "Waterbury and believed and relied upon the fact that said report "did show said items as reported to him by Waterbury," on the ground that the evidence shows that the plaintiff relied upon statements made to him by Waterbury as Waterbury's own opinion, entirely apart from the bank's statement referred to, and entirely apart from any information which Waterbury may have gleaned from the bank report.

3rd. To the eighth finding of fact on the ground that there is no sufficient evidence tending to support it.

4th. To so much of the ninth finding of fact as reads "had the "statements contained in the said report been true" upon the ground that said statements contained in said report were true extracts from the books of the bank, and were in all respects true.

5th. To all of the tenth finding of fact upon the ground that there is no evidence tending to support it.

6th. To all of the eleventh finding of fact upon the ground that it is not in accord with admission made and placed upon the record at page 15 thereof, as follows:

"It is admitted that on the 30th of June, 1904, an assessment of "\$100 per share had been ordered by the stockholders on the direc-
38 "tion of the Comptroller, which was subsequently paid, and
"the plaintiff paid his assessment prior to the commencement
"of this action; and that the proceedings to make that a bind-
"ing assessment were duly taken; and that notice from the Comp-
"troller of the Currency to the bank that its capital stock had be-
"come impaired by the amount of \$100,000, and that under the pro-
"visions of section 5205 of the United States Revised Statutes, such
"deficiency in the capital stock had to be made good by assessment
"upon the stockholders pro rata to the amount of the capital stock
"held by each, or the bank would be placed in liquidation, was re-
"ceived by the bank June 27, 1904."

And said admission should be substituted for said eleventh finding of fact.

7th. To the twelfth finding of fact upon the ground that there is

no evidence tending to support it and it is contrary to the concession appearing upon page 42 of the Record, reading as follows: "It is "conceded by the defendants that between the 28th of March, 1904, "and the 27th of June, 1904, there were no losses of consequence "suffered by the bank."

8th. To all of the thirteenth finding of fact upon the ground that there is no evidence tending to support it, and further, that it is contrary to the concession appearing upon page 42 of the Record reading as follows:

"That at least 30 days prior to the 28th of March, 1904, the Comptroller of the Currency had called the attention of the directors of "the bank by letter to the situation of the bank, and that items (of "which Senator Brackett had a list in Court and which are to be furnished by him in detail) amounting to \$194,107.02 must be regarded as doubtful assets, and that immediate steps should
39 "be taken to collect them, or remove them out of the bank; "and that defendants had knowledge of such letter from the "Comptroller of the Currency at the time that they attested the report."

9th. To all of the fourteenth finding of fact on the ground that there is no evidence tending to support it, and that it is contrary to the evidence.

10th. To all of the fifteenth finding of fact on the ground that it is contrary to the evidence, that there is no evidence tending to sustain it, and that the evidence affirmatively shows that the said defendants attested said report because the Comptroller of the Currency called upon said bank for a statement of its condition, and said report was attested by them as required by the National Banking Law.

11th. To all of the sixteenth finding of fact upon the ground that there is no evidence tending to support it and that the same is contrary to the evidence.

12th. To the conclusion of law numbered "I."

13th. To the conclusion of law numbered "II."

14th. To the refusal to find as requested in paragraph numbered "7th" of the requests submitted by these defendants, and to the exception noted thereto by the trial justice.

15th. To the refusal of the Court to find as requested in paragraph numbered "9th" of the requests submitted by these defendants, and to the exception noted thereto by the trial justice.

16th. To the refusal of the Court to find as requested in paragraph numbered "12th" of the requests submitted by these defendants, and to the statement added thereto, that "he (meaning plaintiff) purchased through his brother-in-law as his agent."

40 17th. To the refusal of the Court to find as requested in paragraph numbered "13th" of the requests submitted by these defendants.

18th. To the refusal of the Court to find as requested in paragraph numbered "15th" of the requests submitted by these defendants.

19th. To the failure of the Court to find as requested in paragraph numbered "16th" of the requests submitted by these defendants.

20th. To the refusal of the Court to find in the language requested

in paragraph numbered "17th" of the requests submitted by these defendants.

21st. To the failure of the Court to find as requested in paragraph numbered "18th" of the requests submitted by these defendants.

22nd. To the failure of the Court to pass upon paragraph numbered "20th" of the requests submitted by these defendants.

23rd. To the refusal of the Court to find in the language requested in paragraph numbered "21st" of the requests submitted by these defendants, and to the modification or addition thereto made by the Trial Justice in language as follows: "Yes, he was plaintiff's agent without compensation. C. C. V. K., J. S. C."

24th. To the failure of the Court to pass upon request in paragraph numbered "22nd" of the requests submitted by these defendants.

25th. To the failure of the Court to find as requested in paragraph numbered "25th" of the requests submitted by these defendants.

26th. To the failure of the Court to find as requested in paragraph numbered "26th" of the requests submitted by these defendants.

27th. To the failure of the Court to find as requested in
41 paragraph numbered "27th" of the requests submitted by these defendants.

28th. To the failure of the Court to find as requested in paragraph numbered "28th" of the requests submitted by these defendants.

29th. To the refusal of the Court to find as requested in paragraph numbered "29th" of the requests submitted by these defendants.

30th. To the refusal of the Court to find as requested in paragraph numbered "30th" of the requests submitted by these defendants.

31st. To the refusal of the Court to find as requested in paragraph numbered "31st" of the requests submitted by these defendants.

32nd. To the refusal of the Court to find as requested in paragraph numbered "33rd" of the requests submitted by these defendants.

33rd. To the failure of the Court to find as requested in paragraph numbered "34th" of the requests submitted by these defendants.

34th. To the refusal of the Court to find as requested in paragraph numbered "35th" of the requests submitted by these defendants.

35th. To the refusal of the Court to find as requested in paragraph numbered "36th" of the requests submitted by these defendants.

36th. To the refusal of the Court to find as requested in paragraph numbered "37th" of the requests submitted by these defendants.

37th. To the refusal of the Court to find the following portion, as requested in paragraph numbered "40th," of the requests submitted by these defendants "The detail to be furnished by Senator Brackett, "the same being in his possession and not having been printed in
42 "the record." (The record, at page 42, reads as follows, the

statement being made by Senator Brackett: "And that items
"which I hold in my hand amounting to \$194,107.02 must
"be regarded as doubtful assets, etc." This last was not printed in the record for the sake of publicity, but we understand that Senator Brackett is to furnish the same in case of an appeal.

38th. To the failure of the Court to find as requested in paragraph

numbered "1st" of the conclusions of law in the requests submitted by these defendants.

39th. To the failure of the Court to find as requested in paragraph numbered "2nd" of the conclusions of law in the requests submitted by these defendants.

40th. To the failure of the Court to pass upon or to find as requested in paragraphs numbered "3rd," "4th," "5th," of the conclusions of law in the requests submitted by these defendants.

41st. To the refusal of the Court to find as requested in paragraph numbered "7th" of the conclusions of law in the requests submitted by these defendants.

42nd. To the refusal of the Court to find as requested in paragraph numbered "8th" of the conclusions of law in the requests submitted by these defendants.

43rd. To the refusal of the Court to find as requested in paragraph numbered "10th" of the conclusions of law in the requests submitted by these defendants.

44th. To the refusal of the Court to find as requested in paragraph numbered "11th" of the conclusions of law in the requests submitted by these defendants.

45th. To the refusal of the Court to find as requested in paragraph numbered "12th" of the conclusions of law in the requests submitted by these defendants.

46th. To the failure of the Court to find as requested in paragraph numbered "18th" of the conclusions of law in the requests submitted by these defendants.

47th. To the refusal of the Court to find as requested by paragraph numbered "14th" of the conclusions of law in the requests submitted by these defendants.

48th. To the refusal of the Court to find as requested in paragraph numbered "15th" of the conclusions of law in the requests submitted by these defendants.

49th. To the refusal of the Court to find as requested in paragraph numbered "18th" of the conclusions of law in the requests submitted by these defendants.

50th. To the refusal of the Court to find as requested in paragraph numbered "19th" of the conclusions of law in the requests submitted by these defendants.

Dated August 5th, 1907.

ROCKWOOD & SALISBURY,

Attorneys for the Defendants,

378 Broadway, Saratoga Springs, N. Y.

To Hon. George H. West, Clerk of the County of Saratoga, N. Y.;
Hon. Edgar T. Brackett, Attorney for the Plaintiff.

44 Supreme Court, Saratoga County,
WILLIAM C. TAYLOR, Respondent,
vs.
CASSIUS B. THOMAS, WILLIAM D. EDDY, and EDGAR D. STARBUCK,
Appellants.

Case and Exceptions.

The issues in this action duly came on for trial before Honorable Charles C. Van Kirk, a Justice of this Court, at a Trial Term held, by consent of parties, at the Town Hall in the Village of Saratoga Springs, N. Y., on the 25th day of March, 1907. A jury trial was waived by consent of the parties.

Appearances:

Edgar T. Brackett for the Plaintiff.
Rockwood & Salisbury for the Defendants.

Mr. Brackett opened the plaintiff's case to the Trial Justice.

Mr. Rockwood, on behalf of the defendants, moved to dismiss the complaint for the following reasons:

First. The action is brought as a common law action for deceit against three men conceded by the complaint to have been, at the time of the commissions of the wrongs alleged, directors of a national bank, operating and conducting the same under the National Banking System at Saratoga Springs, N. Y., and under the United States laws relating thereto; that sections 5207 and 5239 of the Revised Statutes of the United States are sections relating to the
45 operation and management of national banks, and the liability of directors and officers connected therewith, and provide within themselves an exclusive remedy for all violations of the provisions of the statute; the statement of counsel just made is that the directors are liable under the statute; while that may be so, it does not make them liable at common law in an action for deceit; that the National Banking Law provides an exclusive remedy for a violation of any of its provisions; there is no allegation in the complaint in this action that the defendants made or suffered to be made a false entry in any of the books of the bank; that the making of a false report as such—conceding the report to be false, (which the defendant does not concede as a fact)—is not a violation of the National Banking Statute; that there must be the allegation of a false entry, either actively by the directors charged, or by some one with their knowledge, connived at by them.

Second. There is a defect of parties defendant in that the Citizens National Bank of Saratoga Springs, and John H. De Ridder, cashier of the bank at that time, who signed the report, are not made parties defendant to this suit.

Third. The complaint upon its face, even assuming that a common law action for deceit could be maintained, does not state facts sufficient to constitute a cause of action, in that it shows that

the plaintiff himself was guilty of contributory negligence in the purchase of his stock. The allegation of the complaint is that he purchased the stock in June, 1904, relying upon statements published of the condition of the bank on the 28th of March, 1904, or over two months prior to the purchase of his stock. There is no

46 allegation in the complaint that the condition of the bank in June, 1904, at the time he purchased the stock, was the same that it was on the 28th of March, 1904; that such allegation is a necessary and material ingredient of this cause of action, because there is no legal or other presumption to the effect that the condition of the bank on the 28th of March, 1904, was its condition in June, 1904; but, on the contrary, the presumption is otherwise, as the affairs of a bank are constantly changing.

Judge VAN KIRK: I will deny the third cause. I do not think the complaint can be dismissed on the ground that there was negligence on the part of the plaintiff. I think he might rely upon the last bank statement issued.

Judge ROCKWOOD: The National Banking Act contains within itself an exclusive remedy for violations of the act, and defines the liability of directors and officers of national banks; and any cause of action or remedy sought to be enforced against a director or officer by a stockholder must be enforced in accordance with the provisions of the National Banking Law, and the common law action for deceit cannot be maintained under the circumstances set forth in this complaint.

Judge VAN KIRK: That no liability on account of the acts of a director or officer of a national bank exists except such liability as it stated in the statute?

Judge ROCKWOOD: In the National Banking Law.

Senator BRACKETT: The plaintiff brings the action for deceit precisely in the form, and on the ground, that he would have brought it, or might have brought it, if they had issued a prospectus that was false, and that was not at all required by the National Banking Law.

47 Judge VAN KIRK: The defendant claims, and the plaintiff concedes, that this is not an action to recover upon any liability stated in the National Banking Act against a director or officer of a national bank.

Decision upon the motion was reserved and the same was subsequently denied with an exception to the defendants.

WILLIAM C. TAYLOR, called as a witness in his own behalf, after being duly sworn, testified as follows:

Examined by Senator BRACKETT:

I am the plaintiff in this action and reside at Keeseville, Essex County, N. Y. My wife is a sister of William R. Waterbury.

"Q. In or about the month of May, 1904, did you have a conversation with William R. Waterbury relating to an opportunity to purchase Citizens Bank stock?"

Objected to as immaterial and incompetent and hearsay, and that

conversations with William R. Waterbury are not binding upon the defendants.

Objection overruled, exception to defendants.

"A. Yes, sir.

"Q. State the conversation.

Same objection.

Senator BRACKETT: It is for the purpose of establishing an agency in Mr. Waterbury to investigate as to the purchase of the stock; the reliance is the reliance of the agent.

The COURT: I shall sustain the conversation so far as the conversation goes. You may ask if he purchased the stock directly or through somebody.

48 Plaintiff excepts.

"Q. You are the person who purchased thirty shares of the capital "stock of the Citizens Bank?"

Objected to as calling for the conclusion of the witness.

Objection overruled; exception.

"A. I did.

"Q. Did you purchase yourself, or did you purchase through "some person?"

Objected to as incompetent, immaterial, improper and hearsay.

Objection overruled. Exception.

"A. I purchased through another.

"Q. Who?

"A. Mr. William R. Waterbury."

Defendants' counsel moved to strike out the evidence on the grounds urged against its reception.

Motion denied. Exception.

I did not myself see the report published of the Citizens Bank, of its condition in the month of March, 1904; and had not seen such report prior to the time that I purchased the stock.

"Q. Did you rely in making your purchase upon the statements "that Mr. Waterbury made to you?"

Objected to as incompetent, improper, immaterial and hearsay, and as in no way binding upon the defendants, and immaterial for any purpose, and as contradicting the express allegations of the complaint.

Objection overruled. Exception.

"A. I did."

49 Defendants' counsel moved to strike out the answer on the grounds urged against its reception.

Motion denied. Exception.

"Q. Had you any other information except what you obtained "through Mr. Waterbury?"

Same objection; same ruling and exception.

"A. No, sir.

"Q. State whether or not he stated to you that he had examined "the statement of the bank last previously published."

Same objection; same ruling and exception.

"A. He did.

(Letter shown witness.)

The upper part of that letter is in my handwriting; it was written May 24, 1904. I recollect the date because that was the date that my brother-in-law, William R. Waterbury, was at my house in Ilion and was there only a short time. I was called away quickly and I apologized in writing for going away as — did. I wrote it the same evening.

The letter last referred to was offered in evidence by the plaintiff and objected to as being a declaration of the witness in his own favor, and as incompetent, immaterial and hearsay; that any statement from Mr. Waterbury to the witness, or from the witness to Mr. Waterbury, is incompetent, immaterial, hearsay; that it is contrary to the terms of the complaint and is irrelevant for all purposes.

Objection overruled. Exception.

50 "Q. Did you presently after that receive the answer which "is written on the same sheet?"

Same objection; same ruling and exception.

"A. I did.

The answer is in the handwriting of William R. Waterbury. I must have received that shortly after that, the 25th or 26th of May.

The answer, written upon the plaintiff's letter was offered in evidence by the plaintiff.

Same objection; same ruling and exception.

The letter being received and marked "Plaintiff's Exhibit I." Said letter was then read in evidence as follows:

PLAINTIFF'S EXHIBIT I.

DEAR WILL: Find out for me please how many shares of that Bank stock there is for sale at 160; and also tell me what you think the prospects are for future.

I was in such haste this P. M. I could hardly treat you decently. Forgive me, please.

Your Bro.,

W. C. TAYLOR.

DEAR WILL: The quantity is twenty shares with a possibility of thirty. After June 15 if not sold, the owner will hold until the July dividend is paid, then offer for sale again. I think it a good
51 investment and would not think of parting with my stock for the price named.

Yours,

WILL.

"Q. Did Mr. Waterbury state to you what the report showed?"
Same objection; same ruling and exception.

"A. He did.

"Q. State what was said between you as to what the report showed."

Objected to for the reasons last urged; it is substituting the judgment of Mr. Waterbury for the judgment of the witness as to the contents of the bank statement; and the defendants are not liable and cannot be made liable for poor judgment displayed by Mr. Waterbury in any improper analysis made by him of the bank statement; and it is hearsay and incompetent.

Objection overruled. Exception.

"A. Capital, \$100,000; surplus, \$50,000; and undivided profits about \$13,000. I don't remember the exact figures on that.

"Q. Did you believe that statement thus made to you?"

Objected to as incompetent, immaterial and irrelevant.

Objection overruled. Exception.

"A. I did.

52 "Q. And believed that the last statement published by the
"bank did contain the statements that you have just testified
"to?"

Same objection, same ruling and exception.

"A. I did.

"Q. And did you rely upon such statements?"

Same objection, same ruling and exception.

"A. I did.

After that I wrote the letter which has been shown to me and mailed it to Mr. Waterbury on the day it bears date.

Letter offered in evidence by plaintiff.

Objected to as hearsay, incompetent, immaterial and irrelevant.

Objection overruled; exception.

Letter received and marked "Plaintiff's Exhibit 2."

The letter was read as follows:

PLAINTIFF'S EXHIBIT 2.

March 25, 1907. R. R. Law, Sten.

ILION, May 31, 1904.

DEAR WILL: I enclose certified checks for payment of Cit. Bank Stock, \$3,200.00 and \$1,600.00.

You may purchase the 30 shares, if for sale—I have drawn checks so as to make it right either way—(20 or 30 shares).

Please keep the certificates in your safe until I come to Sar. some time.

Thanks for your kindness and trouble.

Your Bro.,

W. C. TAYLOR.

53 I inclosed the checks in it, as stated, and afterwards received from Mr. Waterbury the certificates of Citizens Bank stock amounting to thirty shares.

I afterwards came to Saratoga on the 27th of June, and identify that date from a memorandum in my diary. I know I came then; I do not know but I came before that. I saw Mr. Thomas and Mr. Starbuck at that time but don't remember seeing Mr. Eddy. I had a conversation with Messrs. Starbuck and Eddy; they were together part of the time, and part of the time not.

"Q. I ask this as against Thomas and Starbuck only. State what was said in that conversation when Thomas and Starbuck were together?"

"A. There was not anything material that I can think of that was stated, except that they expressed their sympathy for me in my loss, and that so soon after I had purchased the property. I do not remember what was said more than that."

I do not think I could make any statement of the language used by Mr. Thomas and Mr. Starbuck other than I have.

I think Mr. Starbuck—I will not say positively—but they both expressed their sympathy with me after I had just bought the stock and had lost it so quickly; they were sorry for me. This conversation took place in the banking house of the Citizens Bank. That is the substance of all that I can recollect when we were together. I have no recollection except what I have said. I do not recollect any more than I have said. I can't state what it was. I think

54 they talked the matter over but I can't recollect the things as they stated them. I do not recollect that I had any conversation with Mr. Starbuck separate and alone from Mr. Thomas. I did have a conversation with Mr. Thomas separate and alone from Mr. Starbuck.

"Q. I ask this as against Mr. Thomas: What was that conversation?"

"A. I spoke to Mr. Thomas and told him that my brother-in-law, Mr. Waterbury, had investigated the matter as well as he could, and had asked different persons as to the valuation of the stock, and as to the advisability of buying, and that I had bought from his advice. He said to me that if Mr. Waterbury had asked him that he would have advised him not to buy, or words to that effect. I am not quoting accurately.

That must have been on the 28th of June. I do not recollect anything else of that conversation; it was only a short conversation. I subsequently received a letter from the defendant Thomas, and at that time he was the president of the bank.

Letter offered and received in evidence, marked "Plaintiff's Exhibit 3."

The letter was read as follows:

55

PLAINTIFF'S EXHIBIT 3.

March 25, 1907. R. R. Law, Sten.

Citizens National Bank, Saratoga Springs, N. Y.

C. B. Thomas, President. F. V. Hewitt, Vice-President. J. H.
De Ridder, Cashier.

JUNE 28, 1904.

W. C. Taylor, Esq., Ilion, N. Y.

DEAR SIR: You are requested to call at the bank and confer with Mr. C. B. Thomas, concerning the payment by the stockholders of this bank of a voluntary subscription of \$100 per share.

At a meeting of the directors and many of the stockholders recently held, it was thought advisable to make this request for a voluntary subscription in order to strengthen the bank, the details of which you have probably read in the public press.

Payments have already been made by the stockholders covering two-thirds of the stock of this bank, and we should be glad to have you call so that the whole matter may be explained to you and your payment arranged for.

Yours very truly,

(Sd.)

C. B. THOMAS.

The following admission was made by the parties:

It is admitted that on the 30th of June, 1904, an assessment of \$100 per share had been ordered by the stockholders on the direction of the Comptroller, which was subsequently paid, and the plaintiff paid his assessment prior to the commencement of this action; and that the proceedings to make that a binding assessment were duly taken. And that notice from the Comptroller of the Currency to the bank that its capital stock had become impaired by the amount of \$100,000, and that under the provisions of section 5205 of the United States Revised Statutes such deficiency in the capital stock had to be made good by assessment upon the stockholders pro rata to the amount of the capital stock held by each, or the bank would be placed in liquidation, was received by the bank June 27, 1904.

Cross-examination by Judge ROCKWOOD:

W. R. Waterbury, whose name has been mentioned, is a director in the First National Bank of this place. I had my first talk with Mr. Waterbury on the 24th of May, 1904, at my home at Ilion. I am not sure that any one was present; possibly my wife. I remember the substance of the conversation; I can't give his words, but the substance of it was that he had a chance to buy some thirty shares of Citizens Bank stock for 160, and that he considered it a good investment; that it was worth 160 or more; it was paying four per cent. and five per cent. semi-annually as interest and he

could buy twenty or thirty shares; that he had a lot of the stock himself and he called it worth 175, and he thought it was a good thing for me to buy. He did not say where he could buy it or who he could buy it from; nor did he say by whom it had been offered to him.

"Q. Was there anything more than that?

"A. No, sir.

57 "Q. Had you said anything to Mr. Waterbury before he spoke to you about it?

"A. No, sir."

I had no money then of my own awaiting investment, but had some money of others. I believed what Mr. Waterbury said to me about the stock and believed his statement to be true. I have always found the statements made by him to be true; I relied upon them; he was my brother-in-law and was occasionally at my house. I have conferred with him about business matters quite frequently, and would not be surprised but that I had made other investments on his judgment.

"Q. Did you make this on his judgment?

"A. Almost entirely.

"Q. Did you, prior to the purchase of that stock, have a conference of any kind with either Starbuck, Eddy or Thomas?

"A. No, sir.

I knew them to speak to, but I did not have any conference whatever, or conversation, with any of these gentlemen until sometime in June; when I came up the 27th of June.

"Q. Had you, prior to June 27, 1904, seen the published bank statement of the Citizens Bank?

"A. I think I had.

"Q. Will you swear that you had?

"A. I will not be positive.

"Q. Will you swear to it as a fact?

"A. I will not be positive.

58 "Q. Have you any recollection of seeing one?

"A. I have a recollection of seeing one, but the date I do not remember.

"Q. You do not know whether it was before or after June 27?

"A. I am pretty sure it was before.

"Q. You can't swear to it?

"A. No, sir.

"Q. Was it before you had purchased this stock or after?

"A. After.

"Q. You saw no published bank statement until after you had purchased the stock?

"A. No, sir.

"Q. Did Mr. Waterbury say anything to you about having seen the bank statement?

"A. I think so.

"Q. Will you swear to it?

"A. Yes, sir.

"Q. Is it a fact that he did say so?

"A. Yes, sir.

"Q. What did he say?

"A. What I said a little while ago.

"Q. Repeat it?

"A. It showed that the capital stock was \$100,000; the surplus \$50,000; and the undivided profits over \$13,000.

"Q. He said that the bank statement showed that?

"A. Yes, sir.

He made that statement to me on May 24, 1904. I did not know the date of the last previous statement of the bank. I interested myself to find out about the bank statement; I asked Mr. Waterbury to investigate and find out what he could; I was in Ilion and he was in Saratoga.

Mr. Waterbury said that he investigated and that he had advised with several people, and after he advised with those several people he gave me the result of his investigation. This was in the letters which have been introduced in evidence. I was guided almost entirely by his judgment.

"Q. Did you ascertain or know anything about the loans and dis-
counts of the bank?

"A. No, sir.

"Q. Did you care anything about it?

"A. I did not take pains to find out after what Mr. Waterbury told me."

I verified the complaint in this action and swore to it before a notary public on the 3rd of November, 1904. I did not pay Mr. Waterbury anything for his services in connection with this matter, and he was not in my employ.

Mr. Waterbury did not occupy any position of trust or employment over which I had charge, directly or indirectly, and I was not connected with him in any business in any way. He did more than give me some friendly advice about the matter; he said that this was a good stock to buy. From the evidence he gave me I relied upon what he said, and believed what he said to be true.

"Q. You did not rely upon the bank statement at all?

"A. Certainly; I had his word for it.

"Q. You relied on him?

"A. On his word as to the statement of the bank.

60 "Q. You were relying upon him?

"A. On his statement of what the bank statement was.

"Q. You swore to your complaint? (Counsel reads complaint?)

"A. I presume I did; the paper will show.

"Q. How did you get your knowledge of that if you had no knowl-
edge concerning it?

"A. I got it from the condition of things after the bank failed.

"Q. You got it from the fact that there was an assessment of 100
per cent?

"A. Yes, sir.

"Q. And no other source?

"A. No, sir.

"Q. Then the mere fact that an assessment was ordered brought

"to your mind the conclusion that on March 28, 1904, the bank had no surplus, fund, no profit and no capital?"

"A. That, together with other things, brought it to my mind.

"Q. State the other things?"

"A. Things I had heard from different people.

"Q. What facts?"

"A. I did not know anything about the bank books I had not seen them.

"Q. Did you, before buying the stock, write a letter to any officer, employee or agent of the bank to find out about its affairs?"

"A. No, sir.

61 I bought the stock of a man by the name of Brownell, I did not buy it from Mr. Waterbury; the checks were made payable to Mr. Waterbury. I got the certificates of stock from Mr. Waterbury's hands; they did not come to me by mail from him; he delivered them to me personally. I did not have any communication with Mr. Brownell, I do not know him. I only know that Brownell's stock was bought from the evidence that was told me and know anything else about it—just what Mr. Waterbury told me.

WILLIAM R. WATERBURY, called as a witness for the plaintiff, after being duly sworn, testified as follows:

Examined by Senator BRACKETT:

I reside in Saratoga Springs and have for the last fifty years; I am engaged in the retail clothing business in this town and have been for twenty years or more. Prior to June 1904, I was a stockholder in the Citizens National Bank, but have since sold my stock. I sold it to Mr. Thomas about a year after the failure of the bank—in 1905. I became a director of the First National Bank, a rival of the Citizens National Bank, in August 1904. I was not a director at the time of the purchase of this Taylor stock. I have a personal account with the Citizens National Bank, also an account for the Waterbury Estate, of which I am the executor, with Mr. Taylor, and an account of Waterbury & Company; I have these accounts now and have had continuously ever since. I had these accounts there at that time. I did not have the account for the Waterbury Estate there at that time, it was placed there later.

62 "Q. Sometime about the month of May 1904 was your attention called to the fact that twenty or thirty shares of the Citizens Bank stock could be obtained by purchase?"

Objected to as immaterial and incompetent and as not bearing upon the issue.

Objection overruled. Exception to defendants.

"A. Yes, sir.

"Q. By whom?"

Same objection; overruled; exception to defendants.

"A. D. C. Brownell.

"Q. Were you told at what figure it could be obtained?"

Objected to as immaterial and hearsay; objection overruled; exception to defendants.

"A. Yes, sir."

He asked 165 when he first saw me; later he said he would sell the stock at 160, but the party for whom he was acting, if he did not sell it before June 15th, would hold his stock until after his July dividend and then would look for another purchaser.

I subsequently had a conversation with the plaintiff with respect to this stock at his home at Ilion on May 24, 1904; I was there at his house.

"Q. State that conversation?"

Objected to as hearsay and incompetent and immaterial: not in issue as not pleaded, and as contrary to the terms of the complaint.

63 Objection overruled; exception to the defendants.

"A. Shall I tell anything except the conversation.

"Q. Just the conversation relating to this stock."

Defendants' counsel further objected that a conversation between the plaintiff and his agent with relation to any contemplated purchase is hearsay and incompetent in an action against third parties growing out of the same transaction; and further, agency cannot be proven by the declaration of the agent.

Objection overruled. Exception.

"A. I said to him that I knew of a block of Citizens Bank stock that was for sale, either twenty or thirty shares; that it could be bought for 165, and that their last statement showed that they had a capital of \$100,000, surplus of \$50,000, and undivided profits of between \$13,000 and \$14,000. That they were paying dividends of 5 per cent. and 4 per cent. semi-annually, and that would give it a book value of 163 or 164, and that I would not take 175 for what I owned at that time."

As to the rest of the conversation, Mr. Taylor was on his way to the country; he was going to a funeral or something and I was going to take a train in the course of an hour and a half, and he made reply something like this—that he would think about it. That was the substance of his reply, but the exact language I could not give.

64 "Q. Prior to that time had you seen and examined the report of the bank, published in April, of the condition of the bank on the 28th of March, 1904?"

Objected to as incompetent, immaterial and hearsay; anything that Mr. Waterbury saw or did has no relation to the defendants; it is an effort to substitute the judgment of Mr. Waterbury for the judgment of the plaintiff.

Objection overruled; exception to the defendants.

"A. I had.

"Q. That report was published on what day?

"A. Of the close of business March 28, 1904. Published on the 8th day of April, 1904.

Defendants' counsel moved to strike out the answer on the grounds urged against its reception.

Motion denied; exception to the defendants.

"Q. Prior to this conversation with the plaintiff, had you seen " and examined this report published the 8th of April?

Same objection; same ruling; exception to defendants.

"A. I had.

"Q. Did you believe it to be true?

Objected to as immaterial and incompetent for any purpose, whether Mr. Waterbury believed it or not.

65 Objection overruled; exception to defendants.

"A. I certainly did.

Defendants' counsel moved to strike out the evidence on the grounds urged against its reception.

Motion denied. Exception to defendants.

Plaintiff then offered in evidence the published report. Received and marked "Plaintiff's Exhibit No. 4;" the same read as follows:

Report of the Condition of the Citizens National Bank, at Saratoga Springs, in the State of New York, at the Close of Business, March 28, 1904:

Resources.

Loans and Discounts.....	\$633,166	38
Overdrafts, secured and unsecured.....	2,665	77
U. S. Bonds to secure circulation.....	100,000	00
U. S. Bonds to secure U. S. deposits.....	160,000	00
Premiums on U. S. bonds.....	20,800	00
Stocks, securities, etc.....	225,342	47
Banking house, furniture and fixtures.....	33,000	00
Other real estate owned.....	34,906	72
Due from National Banks (not reserve agents).....	1,114	84
Due from state banks and bankers.....	8,643	46
Due from approved reserve agents.....	76,120	17
Internal revenue stamps.....	308	89
Checks and other items.....	244	50
Exchanges for clearing house.....	1,495	52
Notes of other National Banks.....	8,370	00
Fractional paper currency, nickels and cents.....	1,763	82
Lawful money reserve in Bank, viz:		
Specie	\$29,780	10
66 Legal tender notes.....	33,492	00
		63,272 10
Redemption fund with U. S. Treasurer (5 per cent. of circulation)		5,000 00
Total	\$1,376,174	64

Liabilities.

Capital stock paid in.....	\$100,000 00
Surplus fund.....	50,000 00
Undivided profits, less expenses and taxes paid.....	13,456 75
National Bank notes outstanding.....	95,800 00
Due to other National Banks.....	31,418 68
Due to state banks and bankers.....	613 55
Due to Trust Companies and savings banks.....	2,814 10
Dividends unpaid	25 00
Individual deposits subject to check... \$225,788 15	
Demand certificates of deposit..... 686,256 18	
Cashier's checks outstanding..... 2 23	
United States deposits..... 160,000 00	
	<hr/>
Notes and bills re-discounted.....	1,072,046 56
	<hr/>
Total.....	\$1,376,174 64

STATE OF NEW YORK,
County of Saratoga, ss:

I, J. H. De Ridder, Cashier of the above named bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

J. H. DE RIDDER, *Cashier.*

67 Subscribed and sworn to before me this 6th day of April,
1904.

W. H. WATERBURY,
Notary Public.

Correct—Attest:

C. B. THOMAS,
E. D. STARBUCK,
W. D. EDDY,

Directors.

"Q. At the time of this conversation with Mr. Taylor at Ilion, did you then believe this report to be true?

Same objection as above. Objection overruled. Exception to defendants.

"A. I did.

Defendants' counsel moved to strike out the answer for the same reasons.

Motion denied. Exception to defendants.

"Q. At the time that you wrote the letter, that is part of exhibit I, "and that is in your handwriting, did you believe the report to be "true?

Same objection; same ruling and exception to defendants.

"A. Yes, sir; I did at that time.

Defendants' counsel moved to strike out the answer for the same reasons.

Motion denied. Exception to defendants.

(Exhibit 2 shown to witness): I should judge that I received that letter, as near as I can tell, June 1 or June 2. The certified checks of \$3,200 and \$1,600 were inclosed as stated. I purchased thirty shares of stock of the Citizens Bank and got the certificates
68 and paid over this money—\$4,800, for William C. Taylor, of Ilion, the plaintiff. The certificates were made out in the name of William C. Taylor and I put them in my safe and held them until he came here and delivered them to him.

I paid the money and made the purchase June 1 or 2, 1904.

"Q. At that time did you believe this statement, published April 8, 1904, to be true and correct?

Same objection. Overruled. Exception to defendants.

"A. I did.

Defendants' counsel moved to strike out the answer on the same grounds.

Motion denied. Exception.

"Q. In making that purchase did you rely upon the correctness of that statement?

Same objection. Overruled. Exception to defendants.

"A. Yes, sir.

Defendants' counsel moved to strike out the evidence for the same reasons.

Motion denied. Exception.

Cross-examination by Mr. Rockwood:

I have lived in Saratoga Springs fifty years, and since May 5, 1880, have been engaged in the clothing business; this would be about twenty-seven years.

I have known Mr. Edgar D. Starbuck, one of the defendants in this action, a great many years. I suppose that he conducts
69 the largest retail and wholesale dry goods business in this section. I think that he is a man of substantial means. I have purchased goods in his store and he has in mine, in the course of which I have come to know him. His reputation in Saratoga Springs for truth and veracity and fair dealing is good.

"Q. Do you believe that Mr. Starbuck intentionally and with intent to deceive William C. Taylor, or anyone, signed his name to the bank statement of the Citizens Bank "correct attest," knowing that statement to be false and untrue?

Objected to as calling for the opinion of the witness, and as incompetent and improper and irrelevant for any purpose.

"Q. Do you believe that Mr. Starbuck at any time signed his

"name to the statement in question, or any statement, knowing
 "it to be untrue, and with intent to deceive Taylor or any one?"

Objected to on the ground that it calls for the present belief of the witness and calls for an opinion and a conclusion of law, and is incompetent, irrelevant and improper.

Objection sustained. Exception to defendants.

"Q. Had you any information at the time that you talked with
 "Mr. Taylor, at Ilion, on the 24th of May, 1904, concerning the
 "Citizens Bank or its stock?"

"A. I had the published report.

70 "Q. What other information did you have?"

"A. Not any at that time except the fact that I had been a
 "stockholder for about twelve or thirteen years, and had received
 "dividends regularly, and had never heard the standing of the bank
 "called in question up to that time.

I then owned stock in the bank. The men connected with that bank and its directors who are sued, Mr. Starbuck, Mr. Eddy and Mr. Hewitt, were then and are now three of the most reliable men and prominent business men of our town.

"Q. You know them to be so?"

"A. I think them to be so.

"Q. Did you ever know or hear of a dishonest act of any kind
 "or description done or perpetrated by E. D. Starbuck, William D.
 "Eddy or F. V. Hewitt?"

Objected to as incompetent, improper and irrelevant; nobody has attacked their reputations.

Objection sustained; exception to defendants.

In May, 1904, I was associated in business with Cassius B. Thomas; I was part owner in a piece of property on Washington street; I was part owner in a mortgage on another piece of property on Washington street. At the time of the purchase Mr. Thomas was president of the bank.

I did not consult with Mr. Thomas about it; I did not ask him anything about the value of the stock; I did not happen to find Mr. Thomas when I was making my inquiries. I went into the bank

71 and asked the cashier, Mr. De Ridder, who told me what he thought of it. Then on the sidewalk in front of the Goldsmith place I met the teller of the bank, Mr. W. H. Waterbury, and asked him about it, and what they both told me corroborated the statement that had been made.

After I had received my answers from these two men, Mr. Taylor wanted his answer, and I did not ask Mr. Thomas then because I accepted the statement as actual fact. I did not go any further because of what they told me, or of what Mr. W. H. Waterbury told me particularly; he corroborated the statement so that I believed that statement was absolutely true. I advised with De Ridder and Waterbury as to the future value of the stock.

I did not have any talk with Mr. Starbuck at that time, or with Mr. Eddy or with Mr. Hewitt. They were three of the directors of the bank. Mr. Starbuck's place of business is within two hundred

feet of mine; Mr. Hewitt is directly across the street; Mr. Eddy's is around the corner, I pass Mr. Eddy's place every day, but consulted none of them.

I did not give Mr. Taylor any guarantee that I would see that if he lost any money on this stock I would make it good. I am not interested in this suit and did not institute it.

"Q. Did you cause it to be instituted?

"A. I do not know that I could answer that yes or no.

"Q. Did you institute it or cause it to be instituted?

Objected to as calling for the conclusion of the witness, and as incompetent and improper.

Objection sustained; exception to defendants.

72 The COURT: He may state what he did do in *concord* to that.

I wrote to Mr. Taylor that I was informed that if he brought action against the bank that the probabilities were that he could recover. I was informed about this by Senator Brackett and communicated it to Mr. Taylor. Mr. Taylor had said nothing about bringing the suit up to that time. I cannot state when this was.

I can't state that conversation; the substance of the conversation was this: Could I recover if I brought suit? He asked me that. I swear that I did not give Mr. Taylor my personal guarantee to make him good on this sale, and I am not liable in any way on this transaction. I also swear that I did not sell my own stock. I can't tell who paid Brownell nor do I know who gave the money to him. As I said before, the money for this was put up in Cashier De Ridder's hands in the bank. I gave the checks to Mr. De Ridder. The checks were payable to my order and were endorsed simply with my endorsement on the back in blank; I acquired the stock that day or the day after; it was delivered to me at the bank by Mr. De Ridder or by the teller, I have forgotten which, but I think it was Mr. De Ridder.

I had two or three talks with Mr. Brownell before the purchase; I told Mr. Brownell that I would leave the checks with Mr. De Ridder and he could give his directions as to the certificates. The money was left at the bank and the certificates were there at the bank. I did not buy that stock for myself but for William C. Taylor. During that time I was a stockholder of the bank, owning ten shares.

73 Redirect examination by Senator BRACKETT:

Prior to the time that I consulted counsel for William C. Taylor, he asked me to consult counsel to see what rights he had in the matter, or that in substance.

I have never said that I considered myself liable to Mr. Taylor for this amount.

It is conceded by the defendants that between the 28th day of March, 1904, and the 30th day of June, 1904, there were no losses of consequence suffered by the bank. That at least thirty days prior to the 28th day of March, 1904, the Comptroller of the Currency had

called the attention of the directors of the bank, by letter, to the situation of the bank, and that items (marked in the record "which I hold in my hand"—Senator Brackett's hand), amounting to \$194,107.02, must be regarded as doubtful assets and that immediate steps should be taken to collect them or remove them out of the bank; and that defendants had knowledge of such letter from the Comptroller of the Currency at the time that they attested the report. That of the \$194,107.02, above referred to, \$97,000 never has been realized.

74 The following is the statement which Senator Brackett referred to above:

Mch. 25, 1907. C. C. V. K.

	Amounts to which Comptroller called attention prior to March 28, 1904.	Amounts collected.
Charles M. Davison	\$4,265 80	Nothing
Reynolds Estate	1,115 87	Nothing
Estelle G. Reynolds	603 85	Nothing
Pope note	153 00	Nothing
George H. Ames	2,000 00	Nothing
Premiums on U. S. Bonds	9,000 00	Nothing
Stocks, Securities, Claims, etc.	38,438 03	\$2,765 39
Banking House, overdraft in fire fund account	37,000 00	15,000 00
		(Now carried on books at this amount)
"Other Real Estate"	5,000 00	Nothing
J. H. De Ridder	19,725 00	4,231 87
Belle De R. Ames	12,663 25	11,060 50
O. V. Howland	10,224 87	10,224 87
E. G. Rawson and Alice G. Rawson	25,157 35	25,157 35
W. H. Rowe, Jr.	7,000 00	7,000 00
W. H. Rowe & Son	5,000 00	5,000 00
W. H. Rowe Knitting Co.	6,760 00	6,760 00
Wayside Knitting Company	10,000 00	10,000 00
	<hr/>	
	\$194,107 02	\$97,199 98
	96,199 98	
	<hr/>	
	\$96,907 04	

Plaintiff rests.

75 Judge Rockwood: I move for a non-suit and for a dismissal of the complaint upon the following grounds:

First. The provisions of the National Banking Act, particularly sections 5239 and 5307 of the Revised Statutes, provide an exclusive remedy for any violation by a national bank director of his duty as

such director, or any malfeasance or non-feasance in office; and that the common law action of deceit cannot be maintained, as is sought to be maintained in this action. I urge in that behalf all of the matters urged upon the original motion for a dismissal of the complaint. This is practically a renewal of the motion made at the commencement of the case.

Second. The plaintiff has failed to make out a cause of action in that he has failed to prove actual, intentional fraud on the part of the defendants, or any of them, or any intent to deceive, and there is an entire want of proof of actual or intentional fraud of any kind or character upon which a common law action for deceit can be based.

Third. There is no proof before the Court that the defendants, or any one acting for them, or under their direction, made any false entry in any report of the bank's condition, and the making of a false report is not a violation of the National Banking Act.

Fourth. There is an entire absence of any evidence showing fraud or deceit on the part of any of the defendants, and the case is lacking in proof of that necessary element.

Fifth. No evidence has been produced to show that the bank statement as issued was not a correct and true transcript or copy of the books of the bank.

76 Sixth. The evidence affirmatively shows that the plaintiff

Taylor, did not in any wise rely upon the bank statement, and that he was not led to purchase his stock through any representation made by the defendants, or any of them; but on the contrary he relied upon the judgment of his brother-in-law, W. R. Waterbury, in that respect, and if Mr. Waterbury erred in his judgment of the value of the bank stock, it has no binding effect upon these defendants.

Seventh. Mr. Waterbury is not shown to have been the agent of Mr. Taylor in any way, or to have been placed in any situation by which any acts of Mr. Waterbury in examining the bank statement, or in forming an opinion as to the value of the bank stock, to be binding upon these defendants.

The COURT: I will entertain the motion and pass upon it with the rest of the case.

Motion subsequently denied with an exception to the defendants.

CHARLES D. THURBER, called as a witness for the defendants, after being duly sworn, testified as follows:

Examined by Judge Rockwood:

I am a resident of Saratoga Springs and have been for a good many years. I have occupied the position of cashier of the Citizens National Bank of Saratoga Springs; of the National Bank of Schuylerville and of the Manufacturers National Bank of Mechanicsville, having devoted in all to the banking business about fifteen years. I am familiar with the method of keeping the books in the Citizens

77 Bank of Saratoga Springs and with the methods that were in use on March 28, 1904. At request of defendant's counsel I compared carefully the books of the bank at the close of

business on March 28, 1904, with the statement thereof as published in the newspaper referred to in this action.

"Q. I show you the answer in this case to which is attached a copy of the bank statement as printed in the paper, and I ask you what you found from an examination of the books which you made?"

"A. The statement published was a true statement of the condition as shown by the books."

Cross-examination by Senator BRACKETT:

"Q. Included in that statement, and as making up the figures, were the items on the paper which I show you, in the first column, amounting to \$194,107.02?"

"A. I have no knowledge of that; I was not there.

"Q. You have examined the books?"

"A. Yes, sir; but I do not know anything about the correspondence from the Comptroller."

It is conceded that the items in the statement had not been charged off prior to the published statement of March 28, 1904, and said items were carried upon the books and appear in the statement, and were of the sum of \$194,107.02, the same as referred to in the former concession.

Defendant rests.

Defendants' counsel renewed the motion for a non-suit on all of the grounds heretofore urged.

Decision reserved. Court reserved decision on the whole case.

Motion subsequently denied with an exception to the defendants.

78 *Order Settling Case and Ordering it Filed.*

Supreme Court, Saratoga County.

WILLIAM C. TAYLOR, Respondent,

vs.

CASSIUS B. THOMAS, WILLIAM D. EDDY and EDGAR D. STARBUCK,
Appellants.

It is hereby ordered, that the foregoing case and exceptions, which contains all of the evidence introduced on the trial of this action, be, and the same is hereby settled as the case and exceptions herein; and the foregoing printed copy is hereby ordered to be filed in the office of the Clerk of this Court in lieu of the engrossed copy required by the rules.

Dated August 30th, 1907.

C. C. VAN KIRK, J. S. C.

We hereby consent to the entry of the foregoing order.

EDGAR T. BRACKETT,

Attorney for Plaintiff-Respondent.

ROCKWOOD & SALISBURY,

Attorneys for Defendants-Appellants.

79

Stipulation.

Supreme Court, Saratoga County.

WILLIAM C. TAYLOR, Respondent,

vs.

CASSIUS B. THOMAS, WILLIAM D. EDDY and EDGAR D. STARBUCK,
Appellants.

Pursuant to section 3301 of the Code of Civil Procedure, it is hereby stipulated that the foregoing are true copies of the Notice of Appeal to the Appellate Division, the Complaint, Answer, Defendants' Requests to Find, Decision and Judgment, Defendants' Exceptions to Decision and Refusals to Find, and the Opinion of Mr. Justice Van Kirk; and all the evidence introduced and offered on the trial of this action; and certification thereof by the Clerk of the County of Saratoga is hereby waived. And that the foregoing printed case may be settled and ordered filed in the office of the Clerk of this Court without notice, as the case and exceptions required to be filed by the rules and the Code of Civil Procedure, in lieu of the engrossed copy required by the rules.

Dated August 30th, 1907.

EDGAR T. BRACKETT,

Attorney for Plaintiff.

ROCKWOOD & SALISBURY,

*Attorneys for Defendants.*80 *Order Directing that Record be Placed on File in Office of
Clerk of Appellate Division.*

Supreme Court, Saratoga County.

WILLIAM C. TAYLOR, Respondent,

vs.

CASSIUS B. THOMAS, WILLIAM D. EDDY and EDGAR D. STARBUCK,
Appellants.

Pursuant to Section 1355 of the Code of Civil Procedure, the foregoing printed record, consisting of the case and exceptions, is ordered on file in the office of the Clerk of the Appellate Division of the Supreme Court for the Third Department.

Dated, August 30th, 1907.

C. C. VAN KIRK, J. S. C.

We consent to the entry of the foregoing order.

EDGAR T. BRACKETT,

Attorney for Plaintiff-Respondent.

ROCKWOOD & SALISBURY,

Attorneys for Defendants-Appellants.

81 *Opinion of Mr. Justice Charles C. Van Kirk, Rendered upon Decision of Case.*

Supreme Court, Saratoga County.

WILLIAM C. TAYLOR

vs.

CASSIUS B. THOMAS et al.

For the Plaintiff: Edgar T. Brackett, Esq., Saratoga Springs, N. Y.

For the Defendants: Rockwood & Salisbury, Esqs., Saratoga Springs, N. Y.

VAN KIRK, J.:

This action is brought to recover the sum of \$4,800, with interest from July 1st, 1904, because of deceit practiced upon the plaintiff by the defendants.

During the year 1904, the defendants were directors and stockholders of the Citizens National Bank of Saratoga Springs, which was a national banking association. On April 6th, 1904, the regular report of the condition of the bank was made and was attested by the defendants; the report showing the condition of the bank at the close of business on the 28th day of March, 1904, and containing the following items:

Capital stock	\$100,000 00
Surplus	50,000 00
Undivided profits	13,456 75

82 On or about May 24th, 1904, William R. Waterbury, then a stockholder of the Citizens National Bank, met the plaintiff, his brother-in-law, and spoke to him concerning the purchase of 20 or 30 shares of the said bank stock. Mr. Waterbury informed the plaintiff that he considered the stock a good purchase; he told him the substance of the report of April 6th, the amount of the capital stock, the surplus and approximately the undivided profits, referring at the time to the said report. He also told him of the dividends that the bank had been paying and his own estimate of the value of the stock. The statement showed the stock to be of a book value in excess of \$130 per share. The plaintiff left before the conversation was completed, but later wrote to Mr. Waterbury enclosing two checks, which aggregated \$4,800, and instructing Mr. Waterbury to buy the shares of stock spoken of. The checks were sent on or about the 1st day of June, 1904, and the stock was delivered by Mr. Waterbury to the plaintiff June 27th, 1904. The plaintiff himself never saw the statement, and had no other information at the time he purchased the stock except that furnished him by Mr. Waterbury.

On or about the 27th day of June, the Citizens National Bank

received notice from the Comptroller that its capital was impaired to the amount of \$100,000 and must be made good by assessment, or the bank would be placed in liquidation. Directly thereafter the assessment was regularly made of 100 per cent. on the capital stock, and thereafter, but before this action was begun, the plaintiff paid his assessment in the sum of \$3,000. It is admitted that no losses were incurred by the bank between the 28th day of March, 1904, and the 30th day of June, 1904, so that the condition upon the 28th day of March was the same as upon the 30th day of June, when the assessment was made.

83 On or about March 1st, 1904, the Comptroller informed the bank that items carried as assets to the amount of more than \$194,000 were doubtful, and that immediate steps must be taken to collect them or they be removed from the books of the bank. These items appeared in the report dated April 6th. These facts were known to the defendants at the time they attested the report.

The defendants claim that this action cannot be maintained; that the only action, if any, available to the plaintiff, is one under the National Banking Act; that the statute provides for actions to recover relief against the misconduct of directors, and provides the remedy which must be followed. The rule is, that where a liability is created by statute and the statute provides the remedy, that remedy is exclusive and must be followed (*Plank Road Co. vs. Morley*, 23 N. Y., 553, 554). But here the liability set forth in the complaint is not created by statute; the action is not a statutory action. It is the common law action to recover damages for deceit affecting the plaintiff only, not the bank or the stockholders generally, and must be considered as such. In the complaint the plaintiff has set forth a cause of action for deceit and not a cause of action under the statute.

Such a right of action exists (*Prescott vs. Haughey*, 65 Fed. Rep., 653, 655-659). There is nothing in the U. S. Statutes that destroys the common law action for deceit practiced by the directors of a national bank; (*Hardman vs. Bowen*, 39 N. Y., 198. If the plaintiff were attempting to enforce a liability created by statute against directors of a national bank, we should have a different case than that at bar.

Hale vs. Hardon, 95 Fed. Rep., 766, 769.

84 The cases cited by defendants sustain these propositions.
Bank vs. Peters, 44 Fed. Rep. 13, 14.
Hayden vs. Thompson, 67 Fed. Rep., 273.
Gerner vs. Thompson, 74 Fed. Rep., 125, 126.

In the latter case the Court says: "But rights of action arising at the common law and growing out of transactions not injuriously affecting the capital stock or the interests of the shareholders at large may be enforced by any one suffering special injury thereby." If, therefore, the evidence establishes all of the elements necessary for a recovery in such an action, the action in its present form can be maintained.

Kuelling vs. Lean, Mfg. Co., 183 N. Y., 78, 85.

The report of April 6th, 1904, was attested to be true by the defendants, with the intent that it should be published for the information of the public and for all who would have dealings with the bank and in its stock.

The defendants claim that there is no sufficient proof that the said report or statement was false. We think this contention is wrong. It is conceded that no considerable losses were incurred by the bank after March 28th, 1904, and before June 30th, 1904. On or about June 30th, the 10 per cent. assessment had been ordered and was regularly made. The order from the Comptroller directing the assessment and the assessment thereafter were made in compliance with the United States statutes, paragraphs 5205 and 5206. The Comptroller is required to instruct the bank the amount to

which the capital has been impaired and require the stockholders to make the assessment. (Hulitt vs. Bell, 85 Fed.

Rep., 98.) This assessment having been directed by the Comptroller and made by the stockholders, among whom were the defendants, is evidence that, when the report was made, there was in fact no surplus, no undivided profits and that the capital had been impaired to its full amount. This action of the Comptroller ordering the assessment is a judicial determination for the necessity of such an assessment and is conclusive upon the stockholders and cannot be questioned by them in any collateral proceeding, or in any litigation which may thereafter be instituted. (Banks vs. Mathews, 85 Fed. Rep., 934, 938, 939, and cases cited; Aldrich vs. Campbell, 97 Fed. Rep., 663-5). The evidence shows that the report or statement was false.

The defendants urge that, though the report should be found false, there is not sufficient proof that the defendants knew it to be false, and that they cannot be held liable in an action for deceit based upon the false report, unless they attested the report knowing it to be false. The bank had received notice from the Comptroller about March 1st, 1904, that \$194,000 of the items counted as assets of the bank, were doubtful and must be collected or charged off. This notice was known to the defendants at the time, they being directors of the bank; and it was a direct warning to them by the bank examiner and Comptroller that assets to nearly twice the amount of the capital stock were considered doubtful. This warning is of course not competent proof that the doubtful paper was uncollectible, but it gave to these defendants notice that they should not include all those assets in the report, at least without investigation and examination. Had they examined as they should have

done, they would have learned that the capital was impaired to its full amount. The failure to make any examination is not mere negligence, misjudgment or want of caution, nor is it mere casual indifference to results or breach of duty. It amounts either to actual recklessness of results or to a willful refusal to make the examination, so that they could innocently make a good report, when a true statement of the condition of the bank would perhaps have been ruinous. The facts are very different from those existing in Robinson vs. Hall, 59 Fed. Rep., 648, and Warner vs. Peynor, 82

Fed. Rep., 187, among other things, from the fact that here the defendants had direct warning in writing from the Comptroller, after reports from the bank examiner, of the bad condition of the assets. After the warning by the Comptroller and proof of the actual condition of the bank, at the time of which the report speaks, the Court is bound to hold that either defendants knew the actual condition and concealed it or made the report recklessly. It is not necessary for the plaintiff to show that these defendants actually knew the report to be false; it is sufficient to maintain the action if he shows that the defendants attested this report, not knowing whether it was true or false and not caring what the fact might be, but recklessly paying no heed to the injury which might ensue.

Kountze vs. Kennedy, 147 N. Y., 124, 129.

"Fraud is proven when it is shown that a false representation has been made knowingly or without belief in its truth or recklessly without caring whether it be true or false."

Head note, English Ruling Cases, Vol. XII, p. 250.

Derry vs. Peek, 14 Ap. Cases, 337.

87 The fact that the defendants had reason to believe that the report was false and still made it is evidence of their intent to deceive.

Salisbury vs. Howe, 87 N. Y., 135.

The defendants, as directors of the bank, evidently were at the time in a difficult position. They at least knew, from the warning given by the Comptroller, that the bank was probably in a bad financial condition. What actual facts they knew concerning the condition of the bank is not disclosed by the evidence. A report, however, showing losses to the amount of \$194,000, would more than wipe out the capital stock, surplus and undivided profits, as shown in the report, and would probably cause the ruin of the bank. The officers and directors of the bank would naturally hesitate to make a report which would cause its ruin; but, however loyal this sentiment may be to the bank, it cannot relieve these defendants from the consequences of making a report either falsely or recklessly. After the warning by the Comptroller, and before attesting the report, the defendants must have proceeded upon some reasonable inquiry and have had some apparently good ground for attesting the report as it stood. (Hammond vs. Pennock, 61 N. Y., 145, 151), in order to relieve themselves from responsibility. They were not called as witnesses either to show lack of knowledge of the actual condition of the bank or to show that they made any inquiry or had any apparent ground for attesting this report to be true. On the contrary, the evidence discloses that they had good reason for believing that the report was false.

When this report was made of the standing of the bank, it was made and published to disclose the financial condition of the bank and to assure those who would deal with the bank; and, when
88 it was attested by directors, they knew that, if not true, they were deceiving those who read it, both as to the standing of

the bank and as to the value of the stock. In this particular case the statement assured the public that, not only the capital stock was unimpaired, but there was a surplus and undivided profits of \$63,000, when in fact there was no surplus or undivided profits and the capital was lost. It is not sufficient here to say that this report disclosed the actual condition as shown by the books of the bank. These defendants could not rely upon the books after the warning they had received from the Comptroller. They were told by the Comptroller that the very books contained items of assets to the amount of \$194,000, which the Comptroller considered doubtful. This is not a case in which directors, without warning and without reason to believe that there were considerable inaccuracies in the books of the bank, attest a statement believing it to be true. It is rather a case in which these defendants either knew the statement to be false or willfully refused to make an examination, and, reckless of consequences, attested the report.

The plaintiff and his agent Waterbury relied upon the report in the purchase of this stock. This is the fair inference to be drawn from the facts of the case. Although Waterbury made statements to the plaintiff outside of the report, it appears that it was the report itself which he relied upon in assuring the plaintiff of his estimate of the value. It was the substantial part of the inducement; it is not necessary for the plaintiff to show that it was the sole inducement.

Bank vs. Bank, 56 Fed. Rep., 139.

89 It is said in *Haddock vs. Osmer*, 153 N. Y., 608, "An action to recover damages for deceit cannot be maintained without proof of fraud as well as injury. Actionable deceit cannot be practiced without an actual intention to deceive, resulting in actual deception and consequent loss. But while there must be a furtive intent, it may exist when one asserts a thing to be true which he does not know to be true, as it is a fraud to affirm positive knowledge of that which one does not positively know. Where a party represents a material fact to be true to his personal knowledge, as distinguished from belief or opinion, when he does not know whether it is true or not, and it is actually untrue, he is guilty of falsehood, even if he believes it to be true; and, if the statement is thus made with the intention that it shall be acted upon by another, who does so act upon it to his injury, the result is actionable fraud. (*Kountze vs. Kennedy*, 147 N. Y., 124, 130; *Rothschild vs. Mack*, 115 N. Y., 1, 7; *Marsh vs. Falker*, 40 N. Y., 562, 573; *Bennett vs. Judson*, 21 N. Y., 238; *Addison on Torts*, 1007; 1 *Bigelow on Fraud*, 514)." If under those facts, one should be held liable for the damage causes, he cannot be allowed to escape liability when he had been warned that the report shows a false condition of the bank.

The plaintiff has established all of the elements necessary to maintain the action against the defendants.

English Ruling Cases, Vol. XII., 235, 298.

Pasley vs. Freeman, 3 T. R., 51-65.

Derry vs. Peek, 14 Ap. Cases, 337-380.

Arthur vs. Griswold, 55 N. Y., 410.

Kuelling vs. Lean Mfg. Co., 183 N. Y., 85.

90 The measure of damages in this case is "A sum of money equal to the difference between the value of the property (stock) as it was in fact and the value as it would have been if the representations had been true." (Vail vs. Reynolds, 118 N. Y., 310.) Under the report the value of the stock was \$163 per share. The Comptroller's warning that book assets were doubtful to the amount of \$194,000 is not proof that the assets were in fact valueless to that amount, but the assessment directed by the Comptroller is evidence that its book value was then nothing. Whether the losses passed upon by the Comptroller, in his determination that the assessment must be made, were included entirely in the \$194,000 of doubtful assets, does not appear. It does appear by stipulation that, of that \$194,000 of doubtful assets, \$97,000 have been collected but I am not informed whether before or after the assessment. If we assume, as defendants in their brief say we must assume, that the directors did their duty and collected the entire \$194,000 of doubtful assets, then the cause of the assessment must have been something else than the said doubtful assets. Between the time of the notice from the Comptroller, about March 1st, and the assessment, three months expired; so that, if the directors did their duty, they would probably have collected a large part of that which could be collected before the time of the assessment. If the doubtful assets included all of the losses that had occurred at the time of the assessment, then the stock, after the payment of the \$97,000 collected, was worth \$66 per share, and the plaintiff's loss would be \$94 per share, but no proof is presented as to the actual value of the stock at any time after the assessment, except that the collection of the assessment gave it a value of \$100 per share.

91 Under the proof and the rule of damages, I am bound to hold that the plaintiff has suffered damages as claimed in the sum of \$4800, with interest from the time the stock was delivered, July 1st, 1904.

Order of Affirmance.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Held in and for the Third Judicial Department of said State, at the Appellate Division Court Room, in the City of Albany, Commencing on the 7th Day of January, A. D. 1908.

Present: Hon. Walter Lloyd Smith, Presiding Justice.
 Hon. Alden Chester,
 Hon. John M. Kellogg,
 Hon. Aaron V. S. Cochrane,
 Hon. Albert H. Sewell, Associate Justices.

WILLIAM C. TAYLOR, Respondent,
 against
 CASSIUS B. THOMAS, WILLIAM D. EDDY, and EDGAR D. STARBUCK,
 Appellants.

The defendants having appealed from this judgment herein entered in the Saratoga County Clerk's office on the 1st day of August,

1907, whereby it was adjudged that the plaintiff recover of
 92 said defendants the sum of \$5799.19 damages and costs;
 after hearing Hon. Nash Rockwood, counsel for the appel-
 lants and Edgar T. Brackett, counsel for the respondent, it is

Ordered that the said judgment be, and it hereby is, reversed on
 the Law and the Facts and a new trial granted, with costs to appel-
 lants, to abide event, unless plaintiff stipulates to deduct therefrom
 \$2000.00 and interest, in which case judgment as so reduced, unani-
 mously affirmed without costs.

JOSEPH H. HOLLANDS, *Clerk.*

A Copy.

JOSEPH H. HOLLANDS, *Clerk.*

Entered, March 26, 1908.

JOHN F. HENNESSY, *Dep. Clerk.*

Take Notice, That the foregoing is a copy of an order herein this
 day duly entered in the Saratoga County Clerk's Office.

Dated, March 26", 1908.

EDGAR T. BRACKETT,
Attorney for Plaintiff, Town Hall,
Saratoga Springs, N. Y.

To Messrs. Rockwood & Salisbury, Attorneys for Defendants.

93 *Stipulation Reducing Recovery.*

Supreme Court.

WILLIAM C. TAYLOR

VS.

CASSIUS B. THOMAS, WILLIAM D. EDDY, and EDGAR D. STARBUCK.

The plaintiff hereby stipulates to deduct from the judgment re-
 covered by him against the defendants, entered in the Saratoga
 County Clerk's office August 1", 1907, (said judgment being for the
 sum of \$5688.00 damages) the sum of Two Thousand Dollars, and
 interest.

This stipulation is given by the plaintiff under the terms of an
 order of the Appellate Division, reversing said judgment, unless this
 stipulation is given, but if it is given, affirming said judgment,
 without costs.

Dated, March 25", 1908.

WILLIAM C. TAYLOR, *Plaintiff.*
 EDGAR T. BRACKETT,
Plaintiff's Attorney.

ESSEX COUNTY, ss:

On this 25" day of March, 1908, before me, the subscriber, per-
 sonally came William C. Taylor, to me known to be the person de-
 scribed in and who executed the foregoing instrument, and he ac-
 knowledgeed that he executed the same.

A. W. BOYNTON,
Notary Public.

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Judgment of Affirmance.

Supreme Court, Saratoga County.

WILLIAM C. TAYLOR, Respondent,

vs.

CASSIUS B. THOMAS, WILLIAM D. EDDY, and EDGAR D. STARBUCK,
Appellants.

The plaintiff having recovered a judgment against the defendant for the sum of \$5799.19 damages and costs, which judgment was entered in the Saratoga County Clerk's Office on the 1st day of August, 1907, and the defendants having appealed from said judgment to the Appellate Division of the Supreme Court, and said last named Court having heard the arguments of counsel, and thereafter having handed down an order that said judgment be reversed unless the plaintiff should stipulate to deduct therefrom Two Thousand Dollars and interest, in which case the judgment so reduced was affirmed without costs, the remittitur on which appeal has been filed in this Court; and the plaintiff having executed and filed a stipulation that said judgment be reduced Two Thousand Dollars and interest,

Now, therefore, on motion of Edgar T. Brackett, attorney for the plaintiff, it is

Adjudged, That the judgment thus entered in the Saratoga County Clerk's Office in favor of the plaintiff and against the defendants, as aforesaid, be and the same is hereby reduced Two Thousand Dollars and interest, so that the amount of said judgment as reduced is the sum of Three Thousand Seven Hundred

95 ment as reduced is the sum of Three Thousand Seven Hundred Ninety-nine and 19-100 Dollars damages and costs, and so reduced said judgment is hereby affirmed, without costs.

Dated, March 25", 1908.

JOHN F. HENNESSY,
Dep. Clerk.

Entered, March 26, 1908, 11:30 a. m.

Take Notice, That the foregoing is a copy of a Judgment herein, this day duly entered in the Saratoga County Clerk's Office.

Dated, March 26", 1908.

EDGAR T. BRACKETT,
Attorney for Plaintiff,
Town Hall, Saratoga Springs, N. Y.

To Messrs. Rockwood & Salisbury, Attorneys for Defendant.

Notice of Appeal to Court of Appeals.

Supreme Court, Saratoga County.

WILLIAM C. TAYLOR, Plaintiff-Respondent,

vs.

CASSIUS B. THOMAS, WILLIAM D. EDDY, and EDGAR D. STARBUCK,
Defendants-Appellants.

Please Take Notice, That the above named defendants hereby appeal to the Court of Appeals from the judgment of the Appellate Division of the Supreme Court for the Third Department, entered herein in the office of the Clerk of the County of Saratoga on or about the 26th day of March, 1908, whereby it was adjudged that the judgment entered in this action in said Clerk's office on the 1st day of August, 1907, in favor of said plaintiff and against said defendants for Five Thousand Seven Hundred Ninety-nine Dollars and Nineteen Cents, damages, and costs, be reduced Two Thousand Dollars and interest so that the amount of said judgment as reduced is Three Thousand Seven Hundred Ninety-nine Dollars and Nineteen Cents, and affirming said judgment as so reduced; and the said defendants appeal from each and every part of said judgment, as well as from the whole thereof. The said defendants intend to bring up for review on said appeal, and also appeal from, the order of said Appellate Division on which said judgment hereby appealed from was entered.

Dated, April 30, 1908.

ROCKWOOD & SCOTT,

*Attorneys for Defendants-Appellants.*Office and Post Office Address, 378 Broadway, Saratoga Springs,
N. Y.

To clerk of the county of Saratoga.

To Hon. Edgar T. Brackett, Attorney for Plaintiff-Respondent.

97 *Opinion of Appellate Division.*

Supreme Court, Appellate Division, Third Department.

WILLIAM C. TAYLOR, Respondent,

vs.

CASSIUS B. THOMAS and Others, Appellants.

Argued November Term, 1907. Decided January Term, 1908.

Before Smith, Presiding Justice; Chester, Kellogg, Cochrane, Sewell,
Associate Justices.

Appeal by the defendants from a judgment of the Supreme Court entered in Saratoga County, August 1st, 1907, on a decision of the

Court after a trial at the Saratoga Trial Term before the Court, a jury having been waived.

Nash Rockwood for appellants.

Edgar T. Brackett for respondent.

COCHRANE, J.:

The defendants are directors of the Citizens National Bank organized under the National Bank Law and doing business in the Village of Saratoga Springs, N. Y. Prior to March 1st, 1904, the Comptroller of the Currency informed the directors of the bank by letter that certain specified assets amounting to \$194,107.02, must be regarded as doubtful and that immediate steps should be taken for their collection or removal from the bank. Of such letter the defendants had knowledge. On April 8th, 1904, pursuant to a call of the Comptroller a report of the condition of the bank at the close of business on March 28th, 1904, made in regular form, 98 verified by the cashier of the bank and attested to be correct by each of the defendants was published as required by law.

In such report were included as a part of the resources of the bank the doubtful assets to which the attention of the defendants had been called by the Comptroller. The report also stated that the capital stock of the bank was \$100,000; that there was a surplus of \$50,000 and that there were undivided profits of \$13,456.75. This published report was not seen by plaintiff but its contents were communicated to him and relying on the same he purchased in the early part of June, 1904, thirty shares of the stock of said bank for the sum of \$4800. On June 27th, 1904, the bank received notice from the Comptroller that its capital had become totally impaired and that the same must be supplied by assessment upon the stockholders. Immediately thereafter such assessment was ordered and the plaintiff paid \$3000 on account of the stock he had recently purchased.

Plaintiff has recovered damages amounting to \$4800 and interest on the ground of fraud on the part of the defendants in knowingly attesting and publishing a false report of the condition of the bank, in reliance whereon plaintiff was deceived as to the value of the stock of the bank and purchased said thirty shares thereof to his injury.

In *Yates vs. Jones National Bank*, 206 U. S., 158, it was decided by the Supreme Court of the United States that the civil liability of National Bank directors in respect to making and publishing official reports enjoined by statute is governed by such statute which affords within itself the exclusive rule for the recovery of damages occasioned by such reports. The Court said: "General considera-

99 "tion as to the spirit and intent of the National bank act
" (*Easton v. Iowa*, 188 U. S., 220; *Davis v. Elmira Savings*
" *Bank*, 161 U. S., 275) also render necessary the conclusion
" that the measure of responsibility concerning the violation by
" directors of express commands of the national bank act is in the
" nature of things exclusively governed by the specific provisions
" on the subject contained in that act." The report in question
which is under criticism was not a voluntary statement of the de-

defendants, but was exacted of them in the performance of their official duties by the mandate of the federal statute. That statute declares the duties of the directors in publishing such reports, creates a liability for the violation of such duties, and establishes within itself the exclusive rule and standard for the enforcement of such liability. Section 5239 of the United States Revised Statutes declares a civil liability against bank directors for the precise acts alleged in the complaint herein and under the authority of the Yates case a recovery may be had against the defendants at the instance of the plaintiff, but such recovery must rest exclusively upon the statute and not upon the principles of common law.

It is urged in objection to this judgment that the case was tried and determined in accordance with common law principles. Although the action cannot be maintained at common law it so happens that the common law requirements in this State to sustain an action for fraud are the same as the statutory requirements for the maintenance of this action. The complaint contains all the allegations necessary for the maintenance of the action under the National Bank Law; the findings of the Court are sufficient to sustain the complaint; the evidence is sufficient to sustain such findings; and

100 that a State Court is a proper forum for the prosecution of the action seems to have been the opinion of the Court in the Yates case above cited and admits of no doubt. The

difficulty in that case was that there had been a recovery against the directors without proof of scienter which proof the statute requires. Such proof has been supplied in this case. A right decision will not be reversed merely because a wrong reason has been assigned therefor. There is no claim or pretense by defendants that they have been prejudiced by the theory followed in the Court below.

The case both as to pleading and proof meets the statutory requirements. That the report was false and known to the defendants to be false they do not deny, nor do they attempt to explain their conduct. They did not intend to defraud any particular person but they did intend to deceive the public and to create a false impression as to the financial strength of the bank. Plaintiff relying on their false statement has been injured. Defendants are both legally and morally liable for the natural consequences of their wrongful act and should respond for such damages as plaintiff has sustained because thereof.

But has the plaintiff been damaged to the full extent of the purchase price of the stock? The Trial Court has found that such stock was valueless and has awarded damages equivalent to the purchase price. Such conclusion that the stock was valueless seems to be based on the fact that the Comptroller notified the bank that its capital was exhausted and required an assessment for its full amount. Without expressing either assent or dissent concerning such proposition it does not meet the present situation. It was stipulated at the trial and found by the Court that of the assets criticised by the Comptroller in his warning letter to the bank and amount-

101 ing to \$194,107.02, all was subsequently collected except \$97,000, so that there could not have been a total loss in

the value of the stock attributable to those assets, and it is only in reference to those assets that any scienter on the part of the defendants has been proved. Assuming that the assessment made pursuant to the requirement of the Comptroller is evidence that the stock was worthless it clearly is not evidence that such worthlessness was occasioned entirely by the depreciation in the assets particularly specified by the Comptroller and brought to the knowledge of these defendants. There were it is true no losses or depreciations subsequent to the time of the Comptroller's warning, but it does not follow that there was not a depreciation or impairment of other assets at that time unknown both to the Comptroller and to the defendants. The question is how much was plaintiff's stock depreciated in value by loss in the specified assets amounting to \$194,107.02, which were the only assets concerning the doubtful character of which the defendants are shown to have been aware. The loss to the bank in those assets is established to have been \$97,000. This loss of course would have the effect of eliminating the reported surplus and undivided profits amounting to \$63,455.75, and would deplete the capital of the bank to a little less than \$66,500; but that would leave plaintiff's stock a value of nearly \$2000. If for any cause it was worth less than that such cause has not been proved to have been known by defendants.

The judgment must therefore be reversed on the law and facts and a new trial granted with costs to the appellant to abide the event unless plaintiff stipulates to deduct therefrom \$2000 and interest, in which case the judgment as so reduced should be affirmed without costs.

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Stipulation.

Supreme Court, Saratoga County.

WILLIAM C. TAYLOR, Plaintiff-Respondent,

vs.

CASSIUS B. THOMAS, WILLIAM D. EDDY, and EDGAR D. STARBUCK,
Defendants-Appellants.

It Is Hereby Stipulated that the foregoing are true copies of the case and exceptions, the judgment roll, and notice of appeal to the Appellate Division of the Supreme Court, Third Department, and the record as used on said appeal as contained in the original return stipulated by the respective attorneys herein and settled by the Trial Justice, the order of said Appellate Division filed in the office of the Clerk of Saratoga County, the judgment entered on said order of the Appellate Division, the stipulation given by the plaintiff reducing the judgment of the Trial Court and the notice of appeal to the Court of Appeals, and of the opinion of the Appellate Division of the Supreme Court, Third Department, in this action, and of the whole of such originals.

Dated, May 21, 1908.

EDGAR T. BRACKETT,
Attorney for Pff-Resp't.
ROCKWOOD & SCOTT,
Attorneys for Defts-App'lts.

[Endorsed:] 702. 21,928.

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Court of Appeals.

STATE OF NEW YORK, 88:

Pleas in the Court of Appeals, Held at the Capitol, in the City of Albany, on the First Day of June, in the Year of our Lord One Thousand Nine Hundred and Nine, Before the Judges of said Court.

Witness, the Hon. Edgar M. Cullen, Chief Judge, presiding. R. M. Barber, Clerk.

Remittitur, June 2nd, 1909.

WILLIAM C. TAYLOR, Respondent,
ag't
CASSIUS B. THOMAS and Others, Appellants.

Be it remembered, That on the first day of June in the year of our Lord one thousand nine hundred and eight, Cassius B. Thomas and others, the appellants in this action, came here into the Court of Appeals by Rockwood & Scott, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the Judgment of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And William C. Taylor, the respondent in said action, afterwards appeared in said Court of Appeals by Edgar T. Brackett, his attorney.

Which said Notice of Appeal and the return thereto filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Nash Rockwood, of counsel for the appellants, and by Mr. Edgar T. Brackett, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court, appealed from in this action, be in all things affirmed, on opinion of Cochrance, J., in Appellate Division. And it was further ordered and adjudged that the respondent recover against the appellants costs of appeal to this Court.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be in all things affirmed with costs as aforesaid, and stand in full force, strength and effect.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by them given in the premises, are by the said Court of Appeals, remitted into the Supreme Court of the State of New York, before the Justices thereof, according to the form of the Statute in such case made and provided, to be enforced according to

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law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

R. M. BARBER,
*Clerk of the Court of Appeals
of the State of New York.*

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, June 2nd, 1909.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the Court of Appeals, with the papers originally filed therein, attached thereto.

[SEAL.]

R. M. BARBER, *Clerk.*

106 At a Special Term of the Supreme Court, Held at the Court House in Troy, on the 5th Day of June, 1909.

Present: Hon. Wesley O. Howard, Justice.

WILLIAM C. TAYLOR, Respondent,
ag't
CASSIUS B. THOMAS, WILLIAM D. EDDY, and EDGAR D. STARBUCK,
Appellants.

This cause having been argued in the Court of Appeals and that Court having sent down its Remittitur, directing that the judgment appealed from, in favor of the plaintiff and against the defendants, be, in all things affirmed, Now on motion of Hiram C. Todd of Counsel for the plaintiff, it is,

Ordered That said judgment of the Court of Appeals be, and the same hereby is made the judgment of this Court.

Entered June 7, 1909.

JOHN F. HENNESSY, *Dep. Clerk.*

Masselaer Special Term, June 5, 1909.

Granted and Ordered.

Entered in Saratoga County Clerk's Office.

J. V. JACOBS, *Clerk.*

[Endorsed:] Supreme Court. William C. Taylor, Resp't, vs. Cassius B. Thomas et al., App'l'nts. Copy Order. Edgar T. Brackett, Attorney for the Plaintiff, Town Hall, Saratoga Springs, N. Y. Filed June 7, 1909.

107

Supreme Court, Saratoga County.

WILLIAM C. TAYLOR, Respondent,

vs.

CASSIUS B. THOMAS, WILLIAM D. EDDY, and EDGAR D. STARBUCK,
Appellant-.

The plaintiff having recovered a judgment against the defendants for the sum of Five thousand, Seven hundred ninety-nine and 19/100 Dollars damages and costs, which judgment was entered in the Saratoga County Clerk's office Aug. 1, 1907; and the defendants having appealed therefrom to the Appellate Division of the Supreme Court, where said judgment was modified and, as modified, affirmed, said judgment of affirmance being entered in the Saratoga County Clerk's office March 26, 1908; and the defendants having thereupon further appealed to the Court of Appeals, and said appeal in said last named court having been argued; and said court having handed down its remittitur, whereby it is adjudged that said judgment of the Appellate Division of the Supreme Court so appealed from be in all things affirmed, and that the respondent recover his costs against the appellants, and an order having been made, making said judgment of the Court of Appeals the judgment of this court.

Now, on motion of Edgar T. Brackett, attorney for the plaintiff, it is

Adjudged,—That said judgment in favor of the plaintiff
108 and against the defendants, entered in the Saratoga County Clerk's office on the 1st day of August, 1907, as modified by the judgment of affirmance entered in the Saratoga County Clerk's office March 26, 1908, be and the same is hereby, in all things, affirmed. It is further

Adjudged:—That the plaintiff recover of the defendants the sum of One hundred and Twenty Dollars, costs.

JOHN F. HENNESSY, *Dep. Clerk.*

Entered June 7, 1909, 2:50 P. M.
Judgment Book No. 34, Page 538.

[Endorsed:] Supreme Court. William C. Taylor, Resp't, vs. Cassius B. Thomas and others, Appellants. Copy Judgment of Affirmance. Edgar T. Brackett, Attorney for the Respondent, Town Hall, Saratoga Springs, N. Y.

109 To the Honorable the Supreme Court of the United States and the Several Justices Thereof:

The petition of Cassius B. Thomas, William D. Eddy and Edgar D. Starbuck respectfully shows as follows:

The petitioners were impleaded in an action in the Supreme Court of the State of New York, holden in and for the County of Saratoga, wherein one William C. Taylor was complainant and the petitioners defendants. In and by his complaint in the said action, the said com-

plainant alleged, among other things, that the petitioners were members of the Board of Directors of the Citizens National Bank, a domestic corporation, organized under the banking laws of the United States, engaged in the business of maintaining a national bank in the village of Saratoga Springs, Saratoga County, New York, said bank being subject to all the laws of the United States with respect to the regulation of the banking business carried on by a national bank; that, in pursuance of a call of the Comptroller of the Currency of the United States, the cashier of the said bank made and verified a report of the condition thereof at the close of business on the 28th day of March, 1904, and, as required by the Statute in such case made, the correctness of the said report was attested by the petitioners; that, relying upon the said report, the said complainant purchased stock of the said bank as an investment; that certain statements in the

110 said report so made and attested were false in certain enumerated particulars; that, had said statements been true, the said stock would have been worth what the said complainant paid therefor, but that the said statements being incorrect and false the said stock was of much less value, and, in fact, worthless; that the said complainant was deceived by the said report and statements, and, because thereof, purchased the said stock; and that, by reason of the premises, the said complainant suffered loss to the amount paid by him for said stock, which he would not have done except for said acts of the petitioners. Thereafter, the said action having come on for trial in the said Supreme Court, judgment therein was rendered by the said Court against the petitioners, which, on appeal to the Appellate Division of said Supreme Court, was by it affirmed; and, thereafter, the said action having been appealed to the Court of Appeals of the State of New York, the highest court of the said State in which a decision could be had in the said action, and before which court the petitioners were appellants and the said complainant was respondent, the said judgment was, in turn, by the said Court of Appeals affirmed, and it was by the said Court of Appeals ordered that the record in the said action and the proceedings in the said Court of Appeals be remitted to the said Supreme Court of the State of New York there to be proceeded upon according to law; and the said record was so remitted, and now remains in the said Supreme Court before the Justices thereof.

In the said action, and in the course thereof, it was by the petitioners contended and relied upon, among other things, that the only action, if any, available to the said complainant against the
 111 petitioners in the premises was one under the National Banking Act or Law of the United States; that the said Statute provides for actions to recover relief against the misconduct of directors of national banks, and provides the remedy which must be followed; that such remedy is exclusive; and that, accordingly, the obligations and liability of the petitioners, if any, to the said complainant in the premises was limited and determined by the said National Banking Act or Law, and not otherwise; and the said Court of Appeals held and decided to the contrary of the said contention, and each and every part thereof, and held and decided that the petitioners were liable to the said complainant as in a common

law action of deceit, notwithstanding the provisions of the said National Banking Act or Law; by reason whereof, manifest error in the holding, decision and judgment of the said Court of Appeals of the State of New York has happened, as appears from the judgment, decision and record of the said Court in the said action and in the Assignment of Errors, herewith presented; to the damage of the petitioners.

Wherefore the petitioners pray the allowance of a writ of error to the said Court of Appeals of the State of New York, or to the said Supreme Court of the said State, for the removal of the record, judgment and proceedings in said action into the Supreme Court of the United States for its revision and correction thereof and the reversal of the judgment aforesaid, and citation and supersedeas thereon, according to the form of the Statute in such case made and provided.

CASSIUS B. THOMAS,
WILLIAM D. EDDY, AND
EDGAR D. STARBUCK,
By NASH ROCKWOOD,
Their Attorney.

Allowed this Nov. 19th, 1909—this to operate as a supersedeas upon the execution of a sufficient bond in the Sum of Ten Thousand dollars.

JOHN M. HARLAN,
Asso. Justice S. C. U. S.

112 [Endorsed:] Cassius B. Thomas et al., Plaintiffs in Error, vs. William C. Taylor, Defendant in Error. Petition for writ of error. Court of Appeals of the State of New York. Filed Dec. 7, 1909. Geo. H. West, clerk of Supreme Court. Due and proper service of the written petition and the receipt of a copy thereof, is hereby admitted and acknowledged this 7th day of Dec., 1909. Edgar T. Brackett, attorney for William F. Taylor, defendant in error. Filed Dec. 7, 1909.

113 In the Court of Appeals of the State of New York.

CASSIUS B. THOMAS, WILLIAM D. EDDY, and EDGAR D. STARBUCK,
Appellants,
vs.
WILLIAM C. TAYLOR, Respondent.

Assignment of Errors.

Come now the defendants, Cassius B. Thomas, William D. Eddy and Edgar D. Starbuck, petitioners for a writ of error from the Supreme Court of the United States to the said Court of Appeals of the State of New York in the above entitled cause, and, separately and severally, submit that, in the record, proceedings, decision and judgment of the said Court of Appeals in the said cause there is manifest error, in that the said Court erred as follows:

(1) In holding and deciding that, upon the matters and things in the complaint in the said cause set forth, an action as at common law for deceit could be maintained against the petitioners, defendants to the said complaint, and in the said cause.

(2) In not holding and deciding that the only liability, if any, of the said petitioners to the complaint in the said cause was upon and under the National Banking Act or Law of the United States, and especially Section 5239 of the Revised Statutes of the said United States.

(3) In holding and deciding that the said complaint sets forth an action as at common law for deceit.

114 (4) In holding and deciding that the supposed cause of action set forth in and by the said complaint is not governed and limited by the liability, if any, imposed upon the petitioners by the National Banking Act or Law aforesaid.

(5) In not holding and deciding that the petitioners were not liable to said complainant unless they, the petitioners, in attesting the certain report in the said complaint mentioned, did so with knowledge of its falsity in all or any of the particulars in the said complaint enumerated, and with the intent to deceive, and to violate the provisions of the National Banking Act or Law aforesaid.

(6) In holding and deciding that the petitioners either had knowledge of the falsity of the said statements, or any of them, in the said report, or attested the same recklessly or without examination as to the truth thereof.

(7) In holding and deciding that the certain notice from the Comptroller of the Currency of the United States to the certain bank in the said complaint mentioned, of, to-wit, the 27th day of June, 1904, was an adjudication or notice that the capital of the said bank was impaired, or was evidence of such impairment.

(8) In holding and deciding that the certain notice or information from the Comptroller of the Currency of the United States to the certain bank in the said complaint mentioned, of, to-wit, the first day of March, 1904, was evidence that the certain assets in the said notice or information referred to as doubtful were, in fact, doubtful.

115 (9) In holding and deciding as matter of fact that the said report so alleged to have been attested by the petitioners was untrue in the particulars in the said complaint enumerated, or in any of them.

(10) In holding and deciding as matter of fact that there was no evidence showing, or tending to show, that the said report so alleged to have been attested by the petitioners was true in the particulars in the said complaint enumerated.

(11) In holding and deciding that the said report so attested by the petitioners was attested by them with the intention of causing the public, or any member thereof, to believe that the said bank in the said complaint mentioned was in the financial condition appearing from the said report, or to invite the public, or any member thereof, to deal with the said bank or in its stock on the assumption that such condition in fact existed; the fact being that the said re-

port was made by the cashier of the said bank and attested by the petitioners, as directors thereof, in response to a call of the Comptroller of the Currency of the United States, and in obedience to, and compliance with, the laws of the United States in that behalf.

(12) In holding and deciding that, in buying the stock of the said bank aforesaid, the complainant, respondent in the said Court of Appeals, relied upon the report aforesaid and the statements therein contained as emanating from the petitioners.

(13) In holding or deciding that there was sufficient, or any, legal evidence showing, or tending to show, that the statement of the condition of the said bank aforesaid, as made in the report aforesaid, was in fact not true in the particulars in the said complaint enumerated, or any of them.

(14) In not holding and deciding that there was an entire absence of any evidence showing, or tending to show, fraud or deceit, or attempt at either, on the part of the petitioners in attesting the said report aforesaid.

(15) In not holding and deciding that the petitioners were not liable to the said complainant, respondent as aforesaid, by reason of the attestation of the said report aforesaid, made in pursuance of a call by the Comptroller of the Currency of the United States, and intended to show, and in fact showing, the condition of the bank aforesaid at the close of business on the 28th day of March, 1904, according to the books, accounts and records of the said bank.

(16) In not deciding and determining the questions involved in the said action in accordance only with the provisions, true intent and meaning of the National Banking Act or Law of the United States aforesaid, and in deciding and determining the said questions in assumed accordance with the principles of the common law, and in erroneously deciding the same in accordance with such principles.

(17) In not reversing the judgment of the said Supreme Court of the State of New York and the Appellate Division thereof, and in affirming the same.

Wherefore the petitioners severally pray that the judgment of the said Court of Appeals of the State of New York be reversed, and that judgment be rendered in favor of the petitioners, and for costs.

CASSIUS B. THOMAS,
WILLIAM D. EDDY,
EDGAR D. STARBUCK,
By NASH ROCKWOOD,

Their Attorney.

[Endorsed:] Cassius B. Thomas et al., Plaintiffs in Error, vs. William C. Taylor, Defendant in Error. Assignment of Errors. Filed Dec. 7, 1909. Geo. H. West, Clerk of Supreme Court. Due & proper service of the within Assignment of Errors, & receipt of a copy thereof is admitted, this 9th day of Dec., 1909. Edgar T. Brackett, Attorney for Wm. C. Taylor, defendant in error. Filed Dec. 7, 1909.

119 In the Supreme Court of the State of New York.

CASSIUS B. THOMAS, WILLIAM D. EDDY, and EDGAR D. STARBUCK,
Plaintiffs in Error,

vs.

WILLIAM C. TAYLOR, Defendant in Error.

Know all men by these presents, That we, Cassius B. Thomas, William D. Eddy and Edgar D. Starbuck as principals, and The United States Fidelity and Guaranty Company, a corporation organized and existing under and by virtue of the Laws of the State of Maryland, and having an office and regular place of business in the City, County and State of New York, as surety, are held and firmly bound unto William C. Taylor in the sum of Ten thousand (10,000) Dollars, lawful money of the United States of America, to be paid to the said William C. Taylor, his executors or administrators, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our executors, administrators, successors and assigns, respectively, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 27th day of November A. D. 1909.

Whereas, the above named plaintiffs in error, Cassius B. Thomas, William D. Eddy and Edgar D. Starbuck, seek to prosecute
120 their Writ of Error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of New York on a remittitur from the Court of Appeals of the said State of New York;

Now, therefore, the condition of this obligation is such that if the above named Cassius B. Thomas, William D. Eddy and Edgar D. Starbuck, plaintiffs in error, shall prosecute their said Writ of Error to effect and answer all damages and costs that may be adjudged if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

EDGAR D. STARBUCK,
WILLIAM D. EDDY,

[L. s.]
[L. s.]

[CORPORATE SEAL.]

THE UNITED STATES FIDELITY
AND GUARANTY CO.,

By HENRY W. BENTON,
CLARENCE B. KILMER,

[L. s.]
[L. s.]

Attorneys in Fact.

STATE OF NEW YORK,
County of Saratoga, ss:

On this 27th day of November, 1909, before me, the subscriber, personally came William D. Eddy and Edgar D. Starbuck, to me known and known to me to be the same persons named in and who

executed the foregoing instrument, and they severally acknowledged to me that they executed the same.

WM. E. BENNETT,
Notary Public.

- 121 Bond approved, and to act as a supersedeas.
(Signed) JOHN M. HARLAN,
Asso. Justice Sup. Ct. U. S.

Dec. 2, 1909.

- 122 VILLAGE OF SARATOGA SPRINGS,
County of Saratoga, State of New York, ss:

On this 27th day of November, 1909, before me personally appeared Henry W. Benton, Attorney-in-fact of The United States Fidelity and Guaranty Company, a corporation created and existing under and by virtue of the Laws of the State of Maryland, and duly authorized to transact business in the State of New York, with whom I am personally acquainted, who being by me duly sworn, said: That he resides in the Village of Saratoga Springs, that he is the Attorney-in-fact of The United States Fidelity and Guaranty Company; that he knows the corporate seal of said Company; that the seal affixed to the annexed instrument is such corporate seal; that it was affixed thereto by the order of the Board of Directors of said Company, and that he signed said instrument as Attorney-in-fact of said Company by like authority. And the said Henry W. Benton further said that he is acquainted with Clarence B. Kilmer and knows him to be the Attorney-in-fact of said Company; and that the signature of the said Clarence B. Kilmer, subscribed to the said instrument is the genuine handwriting of the said Clarence B. Kilmer, and was thereto subscribed by the like order of the said Board of Directors, and in the presence of him, the said Henry W. Benton.

[NOTARIAL SEAL.]

W. H. COGAN,
Notary Public.

At a meeting of the Board of Directors of The United States Fidelity and Guaranty Company, held at the office of the Company in the City of Baltimore, State of Maryland, on the ninth day of September, 1907, at which was present a quorum of said Directors duly authorized to act in the premises, on motion it was unanimously

Resolved, That in pursuance of Section 811 of the New York Code of Civil Procedure Henry W. Benton and Clarence B. Kilmer are hereby constituted and appointed the true and lawful Attorneys of The United States Fidelity and Guaranty Company for the County of Saratoga, in the State of New York; it being the intention of this Resolution to fully authorize and empower Henry W. Benton jointly with Clarence B. Kilmer to sign, execute and deliver for and on behalf of this Company any and all bonds or undertakings mentioned or referred to in said Section 811 of said Code, that may be given or required in any Court or legal proceedings in said County, or any other bonds or undertakings that may be given or required

in any legal proceedings in said County; and also any and all stipulations, bonds and undertakings given or required in any judicial action or proceeding over which a United States Court shall exercise jurisdiction, and to attach thereto the seal of the Company.

HENRY W. BENTON.

VILLAGE OF SARATOGA SPRINGS,
County of Saratoga, State of New York, ss:

I, Henry W. Benton, Attorney-in-Fact of The United States Fidelity and Guaranty Company, have compared the foregoing Resolution with the original thereof, as recorded in the Minute Book of the said Company, and do hereby certify that the same is a true and correct transcript therefrom, and of the whole of said original Resolution.

Given under my hand and the seal of the Company at Saratoga Springs, N. Y., this 27th day of November, 1909.

HENRY W. BENTON,
Attorney-in-fact.

Statement.

The United States Fidelity and Guaranty Company.
Home Office, Baltimore, Md.

Capital Paid in Cash \$1,700,000. Total Resources Over \$3,800,000.

At the Close of Business March 31st, 1908.

Commenced Business August 1, 1896.

Assets.

Real Estate, H. O. Property (assessed valuation \$406,450.00)	\$400,000.00
Real Estate, other Properties	117,607.96
Baltimore City, State and Municipal Bonds	1,592,428.11
United States Bonds	102,900.00
Railroad and other Bonds	378,732.50
Bank Stocks	72,025.00
Railroad Stocks	16,050.00
Other Stocks	150,000.00
Cash on hand and in Banks	316,561.60
Due by U. S. Government under construction contracts	98,479.76
Loans secured by Collaterals	103,285.00
Loans secured by Mortgages	11,750.00
Premiums in course of collection (less commissions)	425,126.58
Due for Subscriptions, Dept. Guaranteed Attorneys	37,470.05
Interest Due and Accrued	24,511.07
	<hr/>
	\$3,846,927.63

Liabilities.

Capital Stock, Paid in Cash.....	\$1,700,000.00
Accrued Taxes, not yet due.....	6,108.12
Reserve for Outstanding Claims.....	495,261.36
Premium Reserve	1,427,156.68
Surplus	218,401.47
	<hr/>
	\$3,846,927.63

VILLAGE OF SARATOGA SPRINGS,

County of Saratoga, State of New York, ss:

Henry W. Benton, being duly sworn, says that he is the Attorney-in-fact of The United States Fidelity and Guaranty Company; and that, to the best of his knowledge and belief, the foregoing is a true and correct statement of the financial condition of said Company, as of March 31st, 1908, and that the financial condition of said Company is as favorable as it was when such statement was made.

HENRY W. BENTON.

Subscribed and sworn to before me this 27th day of November
A. D. 1909.

W. H. COGAN,
Notary Public.

123 [Endorsed:] In the Supreme Court of the State of New York. Cassius B. Thomas, William D. Eddy and Edgar D. Starbuck, Plaintiffs in Error, vs. William C. Taylor, Defendant in Error. Copy. Supersedeas Bond Given by Plaintiffs in Error, and The U. S. Fidelity & Guaranty Co., Surety. Filed Dec. 7, 1909. Geo. H. West, Clerk of Supreme Court. Nash Rockwood, Attorney for Plaintiffs in Error, Saratoga Springs, N. Y. Personal service of a copy of the within bond is admitted this 7 day of Dec., 1909. (Signed) Edgar T. Brackett, Attorney for William C. Taylor, Defendant in Error.

124 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court, on a remittitur from the Court of Appeals of the State of New York, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between William C. Taylor, plaintiff, and Cassius B. Thomas, William D. Eddy, and Edgar D. Starbuck, defendants, wherein was drawn in question the validity of a treaty or statute of, or an au-

thority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the con-
 125 struction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said defendants as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the second day of December, in the year of our Lord one thousand nine hundred and nine.

JAMES H. McKENNEY,

Clerk of the Supreme Court of the United States.

Allowed by

JOHN M. HARLAN,

*Associate Justice of the Supreme
Court of the United States.*

[Endorsed:] Cassius B. Thomas, William D. Eddy & Edgar D. Starbuck, Plaintiffs in Error, vs. William C. Taylor, Defendant in Error. Writ of Error. Supreme Court of New York. Filed Dec. 7, 1909. Geo. H. West, Clerk of Supreme Court.

Due & proper service of the within Writ of Error, and the receipt of a copy thereof, is hereby admitted & acknowledged, this 7th day of December, 1909.

EDGAR T. BRACKETT,

*Attorney for William C. Taylor,
Defendant in Error.*

126 UNITED STATES OF AMERICA, ss:

To William C. Taylor, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty

days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of New York wherein Cassius B. Thomas, William D. Eddy, and Edgar D. Starbuck are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John M. Harlan, Associate Justice of the Supreme Court of the United States, this second day of December, in the year of our Lord one thousand nine hundred and nine.

JOHN M. HARLAN,
*Associate Justice of the Supreme Court
of the United States.*

127 [Endorsed:] Cassius B. Thomas, William D. Eddy & Edgar D. Starbuck, Plaintiffs in Error, vs. William C. Taylor, Defendant in Error. Citation. Supreme Court of New York. Filed Dec. 7, 1909. Geo. H. West, Clerk of Supreme Court.

Due and proper service of the within Citation, and the receipt of a copy thereof, are hereby accepted, admitted, and acknowledged, this 7th day of December, 1909, & I hereby enter an appearance for William C. Taylor, the defendant in error, in the Supreme Court of the United States.

EDGAR T. BRACKETT,
*Attorney for William C. Taylor,
Defendant in Error.*

128 STATE OF NEW YORK,
County of Saratoga, ss:

I, George H. West, Clerk of said County of Saratoga, and also Clerk of the Supreme Court of the State of New York, in and for said County, do hereby certify that the foregoing is a true, full and complete transcript and copy of the original record in the case of William C. Taylor, Plaintiff, vs. Cassius B. Thomas, William D. Eddy and Edgar D. Starbuck, defendants, and also of the opinion of the Court rendered therein, and of the whole thereof, as remitted by the Court of Appeals of the State of New York and as the same now appears on file in my office with the remittitur of said Court of Appeals attached thereto, and of the order of the Supreme Court made on such remittitur, and of the judgment entered on such remittitur and order in my office, and of the whole thereof.

I further certify that the annexed Petition for a Writ of Error, Writ of Error, and Citation are the originals which were lodged in my office, and the whole are now returned in obedience to said Writ of Error.

I further certify that I have duly retained in my office true and correct copies of said Petition for a Writ of Error, Writ of Error, and Citation with the endorsements thereon.

I further certify that annexed hereto is a copy of the supersedeas

bond given by the plaintiffs in error and approved by Honorable John M. Harlan, Associate Justice of the Supreme Court of the United States, the original bond being retained by me and being on file in my office.

129 In testimony whereof, I have hereunto set my hand and the seal of said Court at Ballston Spa, N. Y., this 8th day of December, 1909.

[Saratoga County Seal, 1866.]

GEO. H. WEST,
*Clerk of Saratoga County, N. Y., and Clerk
of the Supreme Court of the State of New
York in and for said County of Saratoga.*

130 UNITED STATES OF AMERICA,
*Supreme Court of the State of
New York, County of Saratoga, ss:*

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I have hereunto subscribed my hand and affixed the seal of said Supreme Court in and for the County of Saratoga, at Ballston Spa in said County of Saratoga, this 8th day of December, A. D. 1909.

[Saratoga County Seal, 1866.]

GEO. H. WEST,
*Clerk of the County of Saratoga and Clerk of
the Supreme Court of the State of New York
in and for said County of Saratoga.*

Endorsed on cover: File No. 21,928. New York Supreme Court. Term No. 702. Cassius B. Thomas, William D. Eddy and Edgar D. Starbuck, plaintiffs in error, vs. William C. Taylor. Filed December 11th, 1909. File No. 21,928.

Supreme Court of the United States

OCTOBER TERM, 1909.

No. 702 324 171

Office Supreme Court, U. S.
FILED.

JAN 19 1910

JAMES H. MCKENNEY,

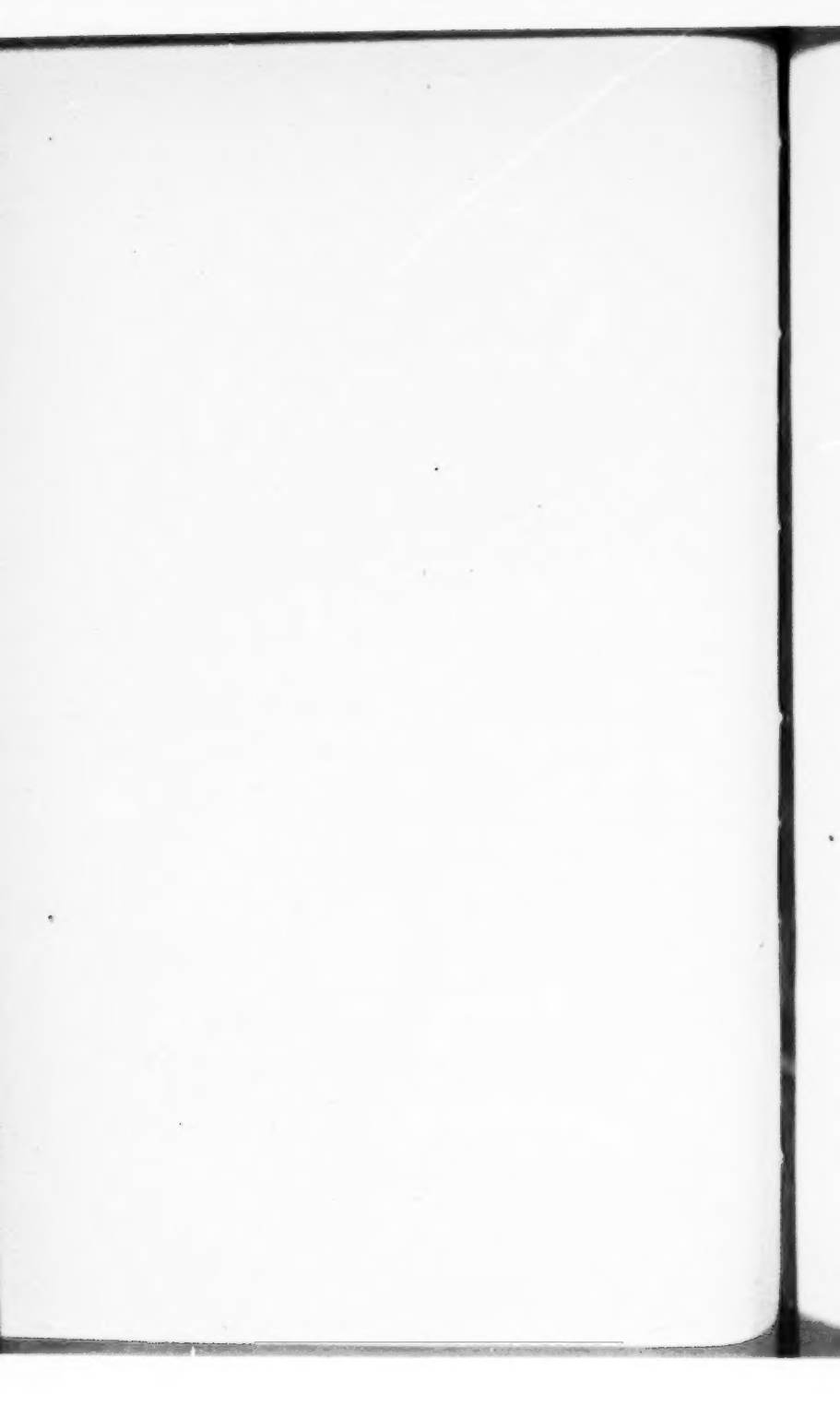
CASSIUS B. THOMAS, WILLIAM D. EDDY
AND EDGAR D. STARBUCK,
Plaintiffs in Error,

VS.

WILLIAM C. TAYLOR,
Defendant in Error.

MOTION TO DISMISS WRIT OF ERROR AND AFFIRM JUDGMENT

EDGAR T. BRACKETT,
Attorney for Defendant in Error,
Town Hall,
Saratoga Springs, N. Y.



IN THE SUPREME COURT OF THE UNITED STATES

CASSIUS B. THOMAS, WILLIAM D. EDDY
and EDGAR D. STARBUCK,
Plaintiffs in Error.

vs.

WILLIAM C. TAYLOR,
Defendant in Error.

1

Take Notice, That on all the papers and proceedings herein, I shall submit to the Supreme Court of the United States at a stated term thereof on Monday, the 7th day of February, 1910, at the Capitol in the City of Washington, District of Columbia, at the opening of Court on that day, or as soon thereafter as counsel can be heard, the motion of which the foregoing are copies, and that I shall submit with said motions and in support of the same, the arguments annexed hereto.

Dated, Saratoga Springs, N. Y., January 14, 1910. 2

EDGAR T. BRACKETT,
Attorney for Defendant in Error,
Town Hall,
Saratoga Springs, N. Y.

To NASH ROCKWOOD, ESQ.,
Attorney for Plaintiffs in Error.

3 IN THE SUPREME COURT OF THE UNITED
STATES.

CASSIUS B. THOMAS, WILLIAM D. EDDY
and EDGAR D. STARBUCK,

Plaintiffs in Error.

vs.

WILLIAM C. TAYLOR,

Defendant in Error.

4 Now comes William C. Taylor, the defendant
in error, by Edgar T. Brackett, his counsel, and
moves this Court to dismiss and quash the paper
purporting to be a Writ of Error herein, for want
of jurisdiction and because the paper purporting
to be a Writ of Error is irregular and insufficient
on the grounds stated in the annexed argument,
and the said defendant in error also moves this
Court to affirm the judgment of the Supreme
Court of the State of New York herein upon the
ground that it is manifest that the paper pur-
porting to be a Writ of Error herein was taken
for delay only, and that the question upon which
it is claimed that jurisdiction depends is so friv-
olous as not to need further argument.

EDGAR T. BRACKETT,

5 Attorney for Defendant in Error,

Town Hall,

Saratoga Springs, N. Y.

21

Office Supreme Court, U. S.
FILED.

JAN 19 1910

JAMES H. McKENNEY,

Clerk.

Supreme Court of the United States

OCTOBER TERM, 1909.

No. ~~170~~ ~~171~~ 171

CASSIUS B. THOMAS, WILLIAM D. EDDY
AND EDGAR D. STARBUCK,
Plaintiffs in Error,

vs.

WILLIAM C. TAYLOR,
Defendant in Error.

BRIEF ON BEHALF OF DEFENDANT IN
ERROR ON MOTION TO DISMISS WRIT
OF ERROR AND AFFIRM JUDGMENT.

EDGAR T. BRACKETT,
Attorney for Defendant in Error,
Town Hall,
Saratoga Springs, N. Y.

The Saratogian Book and Job Print
Saratoga Springs, N. Y.
1910



IN THE SUPREME COURT OF THE
UNITED STATES

No. 702

CASSIUS B. THOMAS, WILLIAM D. EDDY and
EDGAR D. STARBUCK, PLAINTIFFS IN ERROR,
agst.
WILLIAM C. TAYLOR.

**BRIEF OF THE DEFENDANT IN ERROR, ON
MOTION TO AFFIRM THE JUDGMENT
BELOW, ON THE GROUND THAT
THE APPEAL IS FRIVOLOUS.**

The defendant in error brought his action in the Supreme Court of the State of New York, to recover from the plaintiffs in error the sum of Forty-eight Hundred Dollars, damages suffered by him, caused by the attestation by the plaintiffs in error of a false report of the condition of the Citizens National Bank of Saratoga Springs, N. Y. (See Complaint, fols. 3 to 7 of Transcript of record).

The complaint alleged:

(a) The existence of the Citizens National Bank as a domestic corporation, organized under the Banking Laws of the United States, doing business at Saratoga Springs; that the plaintiffs in

error were directors, and John H. DeRidder the Cashier thereof (fol. 3).

(b) That on or about the 6th day of April, 1904, in pursuance of a call of the Comptroller of the Currency, such Cashier made and verified a report of the condition of said bank at the close of business on the 28th day of March, 1904, and that, as required by statute, the correctness of such report was attested by the plaintiffs in error herein, who were directors of the bank, and was published as required by the National Banking Act (fols. 3 and 4).

(c) That, among other things, the report thus attested by the plaintiffs in error stated that the capital stock of the bank was \$100,000, the surplus \$50,000, and its undivided profits \$13,456.75, and that, by attesting the same, the plaintiffs in error represented that the same was correct, (fol. 4).

(d) That in or about the early part of June, 1904, the attention of the defendant in error was called to the stock of the bank as an investment, and, believing the representations made in such report thus attested by the plaintiffs in error to be true, and relying upon the same, he purchased thirty shares of the stock of the bank, and paid therefor the sum of \$160. per share, in all the sum of \$4800 (fol. 4).

(e) That had such statement contained in the report been true, as certified by the plaintiffs in error, such stock would have been worth that sum, or more, and would have been a valuable and safe investment for the defendant in error, for the amount for which he purchased the same (fol. 4).

(f) That, except for such statement thus attested by plaintiffs in error, and if he had not relied upon and believed the same, the defendant in error

would not have made such purchase of stock, (fol. 4).

(g) That the statement thus made and published, and attested by the plaintiffs in error to be true, was false in the following particulars:

The bank had no surplus of \$50,000. nor of any other sum, nor undivided profits of \$13,456.75, nor of any other sum; that the capital stock was not in existence, and unimpaired, to the amount of \$100,000., but on the contrary had been so impaired that the same was practically wiped out, and there was, of the same remaining, not to exceed \$10,000., if so much; that the banking house and furniture and fixtures of the bank were not of the value of \$33,000., nor of any other sum greater than \$10,000., if so much; that the stock of the bank was without any value whatever, or did not have a value to exceed 10% of its face, at the time the defendants attested said report, and when the same was published, nor at the time the plaintiff purchased such stock, nor was such stock ever worth a greater sum than 10%, if so much, until the payment of the assessment hereinafter stated, (fols. 4 and 5).

(h) That, thereafter, such proceedings were had that the stockholders of the bank authorized and ordered an assessment of 100% to be made upon the capital stock thereof, which assessment was approved and ordered by the Comptroller, and, thereupon, the defendant in error paid an assessment of \$3000.; in order to save such stock from sale, and continued to own the same, and thereby the value of such stock was increased by \$3000, the amount thus paid by the defendant in error (fol. 5).

(i) That at the time the plaintiffs in error attested such statement as correct, they knew that

it was not correct, and was false, and it was thus attested by them with the intention of deceiving the public, and, among others, the defendant in error and any one who might deal with said bank, or in said stock, by causing them to believe that the bank was in a prosperous condition, had an unimpaired capital of \$100,000. a surplus of \$50,000. and undivided profits of \$13,456.75, and that its banking house furniture and fixtures were worth the sum of \$33,000, and that said stock was worth the sum of at least \$166 a share, and for the purpose of concealing the true condition of the bank, which was then wholly insolvent, and that the defendant in error was deceived thereby, and, because thereof, made his purchase of such stock, by reason whereof he suffered loss to the amount of \$4800. which he would not have done except for the action of the plaintiffs in error (fol. 6).

Judgment is then demanded in the complaint for \$4,800. and interest, as before stated, (fol. 6).

The paragraphs of the complaint hereinbefore marked a, b and c are admitted by the answer (fols. 7 and 8); d, e, f and g are denied (fol. 9); paragraph h is admitted, qualified to the extent that it is not admitted that such payment was made to save the stock, nor that its value was increased by the amount of \$3000. (fol. 10). Paragraph i is Denied, (fol. 10).

In addition to admitting and denying as stated, the answer further alleges, in its sixth paragraph, (fol. 8) that the report thus made and attested by the plaintiffs in error was a correct and true transcript from the books of the bank, and was not falsified in any respect whatever. This allegation is repeated in the ninth paragraph of the answer (fol. 9). It is further denied that the stock was

without any value whatever, or did not exceed the value of 10% of its face, when such report was attested by the plaintiffs in error and published, and that the stock was never after that time worth a greater sum (fol. 10).

The twelfth paragraph of the answer denies that the plaintiffs in error knew that the statement was false, and denies that it was made with the intention of deceiving the public, or the defendant in error, or anyone else, and reiterates the allegation that it was a true and correct statement of the condition of the bank as shown by its books (fol. 10).

The thirteenth paragraph denies any loss of the defendant in error by reason of such statement (fol. 11).

As a second defense, it is then set up that the Cashier, John H. DeRidder, and the bank, should be joined as parties defendant (fol. 11).

The issues thus joined by these pleadings came on for trial at an adjourned Special Term of the Court, held in Saratoga Springs on the 24th day of March, 1907 (fol. 44). The evidence on the trial was wholly without contradiction, and the facts proven are as follows:

The defendant in error, then residing at Keeseville, Essex County, New York, (fol. 47), was in the year 1904 stationed at Ilion, N. Y., (fol. 62).

In the month of May, 1904, he had a conversation with his brother-in-law, William R. Waterbury, relating to an opportunity then offered to Waterbury to purchase Citizens National Bank stock (fol. 47). Prior to this time the attention of Waterbury had been called by one Brownell to the fact that twenty or thirty shares of the stock of the bank could be obtained by purchase, \$165 being asked at first, and later \$160. (fol. 62)

Waterbury then had the conversation referred to with the defendant in error, which took place at Ilion on the 24th of May, 1904 (fol. 62). At this conversation, Waterbury told the defendant in error that he knew of a block of Citizens Bank stock, either twenty or thirty shares, that was for sale; that it could be bought for \$165; that their last statement showed that they had a capital of \$100,000., surplus of \$50,000. and undivided profits of between \$13,000 and \$14,000; that they were paying dividends of 5%, and 4%, semi-annually, and that would give it a book value of \$163. or \$164. and that he, Waterbury, would not take \$175 for what he owned. The defendant in error told Waterbury he would think about it (fol. 63).

Prior to this time, on the 8th day of April 1904, the bank had published a statement of its condition at the close of business on the 28th day of March, 1904. The making and publishing of this report, and its contents, are admitted in the answer as before seen. In this report it is stated, in its list of liabilities, that the capital of the bank was \$100,000. its surplus \$50,000., and its undivided profits \$13,456.75 (fol. 12a). This report was sworn to by the Cashier of the bank, John H. DeRidder, and was attested as correct by the plaintiffs in error who were directors, they signing their names under the words "Correct, Attest," in the customary form (See same in copy Statement foot of page 8 of record).

At the time of this conversation between Waterbury and the defendant in error, the latter had not seen this report (fol. 48), nor did he have any other information with respect to the stock except what he obtained from Waterbury, (fol. 49) and Waterbury stated to him that he had examined the last

previously published statement (fol. 49), and he had in fact done so (fol. 64), and stated to the plaintiff what that report showed (fol. 51).

Waterbury believed the report to be true at the time he had this conversation with the defendant in error and later (fol. 64 and 65).

In making this purchase the defendant in error relied upon the statements that Waterbury had made to him, as to what the report showed (fol. 51), and had no other information except what Waterbury told him (fol. 49).

Waterbury returned from Ilion to his home after the conversation, and, on the evening of that day, (fols. 49 and 50) the defendant in error wrote to him to find out how many shares of stock could be had at \$160. and asking Waterbury what he thought of the prospects for the future. (See Exhibit No. 1, fol. 50). Waterbury at once replied on the foot of the letter, the defendant in error receiving it shortly after the 25th, or 26th, (fol. 50) that there was offered twenty shares, with a possibility of thirty, and that he thought it a good investment, and would not think of parting with his stock at the price named (see letter foot of Exhibit No. 1, fols. 50 and 51). At the time that Waterbury wrote this letter, he believed the report that had been attested by the plaintiffs in error to be true (fol. 67).

The next occurrence in the transaction was a letter from the defendant in error to Waterbury, indlosing two certified checks, one of \$3200. and one for \$1600., and authorizing Waterbury to purchase thirty shares if they could be obtained, and if not, then twenty, the checks being made so that it could be done either way, and the letter told him to keep the certificates until the defendant in error

came to Saratoga. (Exhibit No. 2, fol. 52). At the time he wrote this the defendant in error relied upon Waterbury's statement of what the report showed (fol. 52). This letter was received by Waterbury June 1st, or 2nd, with the checks inclosed (fol. 67), and he took the checks to the cashier of the bank, Brownell not having told him, and he not knowing, who was the party selling the stock, it having been arranged with Brownell that Waterbury could so leave the checks with the cashier (fol. 72), and he told the cashier that he could make out the certificates and in that way close the purchase for the defendant in error, taking the thirty shares and paying therefor \$4800. (fols. 67 and 68). The certificates were made out to the defendant in error, and Waterbury placed them in his safe and held them until he came to Saratoga, and then delivered them to him (fol. 68). The money was paid and the purchase completed June 1st, or 2nd, and at that time Waterbury believed the statement published April 8th to be true and correct, and relied upon its correctness in making the purchase (fol. 68). The delivery of the stock to the defendant in error was made by Waterbury June 27th (fols. 53 and 68):

It was admitted on the trial that on the 30th day of June, 1904, an assessment of one hundred per cent on the stock of the bank had been ordered paid by the stockholders, on the direction of the Comptroller of the Currency, which assessment was subsequently paid, the defendant in error having paid the amount assessed against his stock prior to the commencement of the action and, further admitted that the proceedings necessary to make a binding assessment were duly taken; that on the 27th day of June, 1904, a notice was received by the bank,

from the Comptroller of the Currency, that the bank's capital had become impaired to the amount of \$100,000. and that, under the provisions of Section 5205 of the Revised Statutes of the United States, such deficiency had to be made good by an assessment upon the stockholders pro rata, to the amount of the capital stock held by each, or the bank would be placed in liquidation (fols. 55 and 56). It was further conceded on the trial that there were no losses of consequence suffered by the bank between the 28th day of March, 1904, and the 30th day of June, 1904; that at least thirty days prior to the 28th of March, 1904 (that being the day of which the report published on the 8th day of April spoke), the Comptroller of the Currency had called the attention of the directors of the bank, by letter, to the situation of the bank, and that items amounting to \$194,107.02 must be regarded as doubtful assets, and that immediate steps should be taken to collect them, or remove them out of the bank, and that the plaintiffs in error had knowledge of this letter from the Comptroller at the time that they attested the report published April 8th, assuming to give the condition of the bank March 28th, and that, of the \$194,107.02 thus mentioned by the Comptroller of the Currency in his letter \$97,000 never was realized (fol. 73).

The only evidence offered on the trial on behalf of the plaintiffs in error was that of C. D. Thurber, cashier of the bank at the time of the trial, who testified that the statement published on the 8th of April was a true statement of the condition of the bank as shown by the books (fol. 77).

It was conceded by the plaintiffs in error that the items amounting to \$194,107.02 referred to by the Comptroller, in his letter, prior to March 28,

1904, had not been charged off prior to the published statement of March 28th, but were actually on the books and appeared in such published statement (fol. 77).

On the 27th of June, 1904, the defendant in error had a conversation with Thomas and Starbuck, two of the plaintiffs in error, and they expressed their sympathy for him, in his loss so soon after purchasing the stock (fol. 53). He also had a conversation with Thomas, the other plaintiff in error, who told him that if Waterbury had asked him about the stock he would have advised him not to buy (fol. 54). This conversation was on the 28th day of June, (fol. 54).

On this evidence and record the Court made a decision finding the corporate charter of the Citizens National Bank under the National Banking Law, (fol. 29) and that the defendants were stockholders and directors thereof during the year 1904 (fol. 29).

That on the 6th of April, pursuant to a call of the Comptroller, the report in question was made and was duly published on or about April 8th, (fol. 29) a copy of the report being annexed to the answer, and showing that the capital stock of \$100,000. was fully paid in, that the surplus was \$50,000. and the undivided profits \$13,456.75, (fol. 30).

That on or about May 24th, 1904, William R. Waterbury, a brother-in-law of the defendant in error, spoke to the latter concerning the purchase of certain shares of the stock of the bank, informed him that he considered it a good purchase, and told him the substance of the report of April 6th, the amount of the capital stock, the surplus and undivided profits, referring at the time to said report,

which was the last one then issued. He also then informed him what dividends the bank had been paying, and his own estimate of the value of the stock, and that the certificates could be purchased at \$165. per share (fol. 30).

That on or about the 2nd day of June, the defendant in error mailed checks to the amount of \$4800. to Waterbury, with instructions to purchase the stock, and that Waterbury did purchase it for \$160. a share, and the certificates were delivered to the defendant in error on the 27th of June, 1904 (fol. 30).

That at the time of the purchase the defendant in error had never seen the published report, and relied upon the statement of Waterbury, and believed and relied upon the fact that the report did show the items as reported to him by Waterbury (fol. 30).

That, prior to the time of the conversation between Waterbury and the defendant in error, Waterbury had seen and examined the report of April 6th, 1904, and believed it to be true when he examined it, and when he communicated the information to the defendant in error, and at the time he purchased the stock on behalf of the defendant in error, and in making such purchase, he relied upon the contents of the report as attested by the defendants (fols. 30, 31).

That, if the statements contained in the report had been true, the stock purchased by the defendant in error would have been worth \$160. a share (fol. 31).

That the report and the statements therein were untrue in the following items, to-wit:

At the time stated in the report the bank did not have undivided profits in any sum, did not have a

surplus in any sum, and did not have a capital stock, unimpaired, in the sum of \$100,000. the capital at that time being lost (fol. 31).

That, about June 27, 1904, the bank received a notice from the Comptroller that its capital was impaired in the sum of \$100,000. and must be made good by assessment, or the bank would be placed in liquidation. Directly thereafter, an assessment of one hundred per cent on the capital stock was regularly made, and, before the commencement of the action, the defendant in error paid his assessment in the sum of \$3000., being the sum assessed upon his thirty shares of stock (fol. 31).

That between the 28th of March, 1904, and the 28th of June, 1904, there were no losses of consequence suffered by the bank, its financial condition being substantially the same on the 28th of June, 1904, that it was on the 28th of March, 1904, (fol. 31).

That on or about the 1st day of March, 1904, the Comptroller, in writing, informed the bank that items carried as assets upon the books of the bank to the amount of more than \$194,000. were doubtful, and that immediate steps must be taken to collect them, or they must be removed from the books of the banks. These items appeared in the report of April 6, 1904. This notice from the Comptroller was known to the plaintiffs in error prior to their attestation of the report, and they knew that the items amounting to \$194,000. had not been removed from the books of the bank (fol. 32).

That, at the time the plaintiffs in error attested the report as correct, they knew, or had reason to believe, that it was not correct, and they either knew that the statement was untrue, or willfully refused to make an examination, and attested the report recklessly (fol. 32).

That such report was so attested by the plaintiffs in error with the intention of causing the public to believe that the bank was in the financial condition shown in the report, and that it had unimpaired capital and surplus, and undivided profits in the sum of \$63,000. when in fact they knew, or had reason to believe, that the report was incorrect and untrue in the respects found before (fol. 32).

That the defendant in error relied on such report, and was deceived thereby, and, in reliance thereon, he purchased the said stock, and by reason thereof suffered a loss of \$4800. the stock at the time of his purchase being of no value (fol. 32).

As conclusions of law the Court found that the defendant in error was entitled to recover from the plaintiffs in error the sum of \$4800., the difference between the value of the stock as it was in fact, and the value as it would have been if the representations had been true, and was entitled to judgment for that amount with interest and costs (fol. 33).

Judgment having been entered upon this decision, as before stated (fols. 33 and 34), the plaintiffs in error appealed therefrom to the Appellate Division, where the judgment was reversed, unless the defendant in error should stipulate to deduct \$2000., and interest thereon, from the amount recovered, but if such stipulation was given, then the judgment was unanimously affirmed, without costs (fols. 91 and 92), this being done because the Appellate Court did not find the stock purchased by the defendant to be wholly worthless (fols. 100 and 101). The defendant in error gave the stipulation required by the order, (fol. 93) and entered judgment of affirmance, (fols. 94, 95) and the plaintiffs in error, thereupon, appealed therefrom.

to the Court of Appeals (fols. 95, 96) where the judgment was affirmed upon the opinion of the Appellate Division (fols. 103 to 106). This judgment of the Court of Appeals having been made the judgment of the Supreme Court by order of the Special Term, (fol. 106) judgment of affirmance was entered, (fols. 107, 108) whereupon the plaintiffs obtained their Writ of Error from this court (fols. 109 to 112) in their assignment of errors (fols. 113 to 118) alleging that the action was one for deceit, at common law, and could not be maintained against them for a false statement published in a report required by the National Banking Act. There are other assignments of error set out, but the foregoing are the only ones here needed to be mentioned, because the only one where any Federal question arises, or as to which the action of this Court may be invoked.

The defendant in error now moves to affirm the judgment, on the ground that the appeal is frivolous. (See Notice of Motion).

The motion should be granted.

I

The appeal is frivolous.

The facts found make out against the plaintiffs in error a case of deceit at common law, and aside from the question of exclusive remedy under that act, which is treated hereafter, the action is maintainable as one at common law, for deceit practiced upon the plaintiff by the defendants in issuing a false statement, by means of which the plaintiff was deceived. It happens that the statement that deceived the plaintiff, was

a report of the condition of the bank required to be published by the Banking Act, but all the elements necessary to maintain an action of deceit are pleaded in the complaint, and all the allegations of the complaint are shown by the evidence to be true.

The essential elements necessary to constitute a cause of action in such a case are representations, falsity, scienter, deception, and injury.

Arthur v. Griswold, 55 N. Y., 400-410,—and the summary of the complaint before given shows each one of these elements to be charged against the defendants. There are alleged:

(a) The certifying to the report,—the representation.

(b) The falsity of the report so attested by the defendants.

(c) The knowledge by the defendants of the falsity.

(d) The deception of the plaintiff.

(e) His damage.

A complaint so alleging states a good cause of action for deceit.

The doctrine is elemental.

Brackett v. Griswold, 112 N. Y., 454-467.

Kley v. Healey, 127 N. Y., 555-561.

Kuelling v. Lean Mfg. Co., 183 N. Y., 78-84-85.

Kingsland v. Haines, 62 App. Div., 146-148.

Ettlinger v. Weil, 94 App. Div., 291-294.

In Mason v. Moore, an Ohio case, 1906 (4 Lawyers' Reports, New Series, pp. 597, 605), the Supreme Court of that state recognized that such an action was maintainable at common law. The

action there was based on a false report of a bank, as here. The verdict had been for the defendant, and the Court allowed it to stand, but the legal rules there held are entirely as here contended by the plaintiff. The precise point on which the defendant was there excused, was his lack of knowledge, or of anything to give him reason to believe, that the report was false. On the point here under consideration the Court says, "If we leave the statute just considered, and look to the common law liability of directors, we find that actions for damages against them, founded on a published false report of the bank, which they attested, are actions for deceit, and they are controlled by the law governing actions of that character."

It is not necessary, in such an action, that the representations should be made directly to the party injured, personally, nor that the fraudulent intent related to the plaintiff, or had in view a design to defraud him in particular. If the representations were made publicly, and the plaintiff became one of the victims, then the law gives him a remedy against any one, or all, of the parties who set the machinery by which he was misled, in motion.

Brackets v. Griswold, 14 St. Rep., 449-451.

Mors v. Switz, 19 How. Pr., 275-287.

Barber v. Morgan, 19 How. Pr., 275-87.

Brackets v. Griswold, 112 N. Y., 454-467-468.

In the case last cited, the Court lays down the rule in the following language: "It is not necessary that the false representation should have been made by the defendant personally. If he

‘authorized and caused it to be made, it is the same as though he made it himself, nor is it necessary that it should have been made directly to the plaintiff. If it was made to the public at large for the purpose of influencing the action of any individual who might act upon it, any person so acting upon it, and sustaining injury thereby, may maintain an action. It is on this ground that promoters, or directors, of corporations have been held liable for false representations in the prospectus, or reports, or other papers issued by the corporation with their sanction, by which individuals have been induced to purchase the stock, or become creditors, of the corporation, and the fact that the false report, or prospectus, purports to be the act of the corporation and not of the promoters, or directors, does not relieve them from personal responsibility.”

The doctrine here urged is so established by a great cloud of authority that it is not possible successfully to challenge it, and a multiplication of citations could only be useful as an exhibition of learning, and would result only in weariness to the judicial flesh.

But the plaintiffs in error greatly rely on *Yates v. Jones National Bank* (206 U. S., 158) decided by this Court in May, 1907, as holding a doctrine that an action cannot be maintained at common law for deceit practiced by means of a false report under the National Banking Act, the remedies provided by the act being exclusive. And the case so holds.

A recovery had there been had against directors for attesting a false report, without showing that they knew that the report was false,—

by the judgment they were made warrantors of its correctness. This appears both in the instructions to the jury, (pp: 167 and 168) and also the refusal to charge (p. 168), all of which ignored the question of knowledge. Recovery can be had in Nebraska for fraud, without showing scienter, (*Foley v. Holtry*, 43 Neb., 133; *Johnson v. Gulick*, 46 Neb., 817; *Moore v. Scott*, 47 Neb., 346) and the holding of the Supreme Court of that state in this Jones National Bank case followed that doctrine. But this Court said and held that this would not do, because, in such case, directors in some states would be held liable only upon knowledge, in others without knowledge, and that the operation of the statute must be uniform, and knowledge must be shown in all cases alike and that, therefore, the remedy for a false statement in a report required by the Banking Act, must be had under its terms.

I think, therefore, all of comfort to the Appellants here, that can be spelled out of this Yates case is that knowledge must be shown of the falsity of representations contained in a report under the Banking Act, (as in New York they must be shown in any action for false representations, the scienter being an essential allegation and proof thereof necessary) before a recovery can be had against directors attesting such false report. And here as we have seen before, such knowledge is shown.

Treating the question, then, as one arising exclusively under the Banking Act, the action was well brought and the recovery rightful under the terms of that Act.

Section 5211 of that Act prescribes this:

“ Every association shall make to the Comptrol-

'ler of the Currency not less than five reports dur-
 'ing each year, according to the form which may
 'be prescribed by him, verified by the oath or af-
 'firmation of the President or Cashier of such as-
 'sociation and attested by the signature of at
 'least three of the directors. Each report shall
 'exhibit, in detail, and under appropriate heads,
 'the resources and liabilities of the association
 'at the close of business on any past day
 'by him specified; and shall be transmitted
 'to the Comptroller within five days after the
 'receipt of a request or requisition therefor from
 'him, and, in the same form in which it is made
 'to the Comptroller, shall be published in a
 'newspaper published in the place where such
 'association is established, or, if there is no
 'newspaper in the place, then in the one pub-
 'lished nearest thereto in the same county, at
 'the expense of the association; and such proof
 'of publication shall be furnished as may be re-
 'quired by the Comptroller. The Comptroller
 'shall also have power to call for special reports
 'from any particular association whenever, in his
 'judgment, the same are necessary in order to a
 'full and complete knowledge of its condition."

The necessary implication of this requirement
 is that the statement thus made and attested must
 be true, and that a false report is prohibited.

And *Yates v. Jones Nat. Bank*, 206 U. S., 158-
 177, expressly so holds.

Section 5239 of the Act reads as follows:

"Section 5239. If the directors of any national
 'banking association shall knowingly violate, or
 'knowingly permit any of the officers, agents, or
 'servants of the association to violate, any of
 'the provisions of this title, all the rights, privi-
 'leges and franchises of the association shall be

thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district, or territorial court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in, or assented to, the same, shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation."

We have then the express requirement of the statute that the reports thus to be made must be true, and, if any director knowingly violates the provisions of the act, as for instance by attesting a false report, he shall be liable for all damages sustained by any person in consequence of such violation.

The plaintiffs in error have, thus far, been willing to concede thus much, thinking that, when such concession is made, they have impaled the defendant in error upon the other horn of the dilemma that, in such case, the violation must be determined in a United States Court, in a suit brought by the Comptroller of the Currency, under the terms of Section 5239. In this they are hopelessly wrong.

Let us again recur to the language of this section.

"If the directors of any National Banking Association shall knowingly violate, or knowingly permit any of the officers, agents or servants of the association to violate, any of the provisions of this title, all the rights, privileges and fran-

‘chises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district, or territorial court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own name’ (in what cases?) ‘before the association shall be declared dissolved.’

No one here is seeking to have the association declared dissolved because of any violation of this statute. If such were the relief sought, then the violation must be adjudged in a United States Court, and not a State Court. No such case is here presented. When such dissolution of the Citizens National Bank is sought, then this essential prerequisite must be conformed to, and the dissolution be had in the Courts of the United States, but such declaration of a violation in a Federal Court is only necessary as a prerequisite to a dissolution of the association.

Then follows the unqualified provision, as to which no preliminary at all is required: ‘And in case of such violation’ (that is any knowing violation of the provisions of the act, not necessarily determined in a United States Court, but in any proper Court) ‘every director who participated in, or assented to, the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of any such violation.’

There are two results that may flow from a violation of the provisions of this section 1. The franchises of the association may be forfeited. If such a result is sought, or reached, it must be through the medium of the Federal Courts. 2.

The directors guilty may be held liable for the damages sustained by any person.

But as to this last no limitation of method, or of form, is prescribed. It is a liability that may be enforced in any forum, having the proper jurisdiction of the person and subject matter.

The only cases in which exclusive jurisdiction is conferred by the Banking Act upon the Courts of the United States are proceedings to enforce the forfeiture of the franchises of banking associations for violations of the act (§ 5239) and proceedings to enjoin the Comptroller from winding up the corporation through a Receiver. There is nothing in the act which withdraws from the jurisdiction of the State Courts civil actions to enforce rights of individuals against National Banks, or their officers.

Brinckerhoff v. Bostwick, 88 N. Y., 52, 61.

That this is the proper construction of this section is expressly held by this Court in *Yates v. Jones National Bank*, at pages 180 and 181, where Mr. Justice White thoroughly disposes of the contention that such violation, (i. e., by making a false report) must be determined in a Federal Court, in the language:

“ There is a suggestion that the subject matter of this controversy is so inherently Federal that, although the judgments of the Circuit Court and of the Circuit Court of Appeals, remanding the cause to the State Court, may not be re-examined (25 Stat. at L. 435, chap. 866, U. S. Comp. State. 1901, p. 509) nevertheless it should now be decided that the State Court was wholly devoid of jurisdiction. This claim is predicated upon the provision of Sec. 5239, Rev. Stat., con-

‘ferring exclusive jurisdiction on Courts of the United States to declare a forfeiture of the character of a national bank as the result of wrongs committed by the directors, and the contention that a declaration of such forfeiture is a prerequisite to an action to enforce the civil liability of directors, and that such action could only be brought in the Courts of the United States after a forfeiture has been adjudged. We content ourselves with saying that we think these contentions are without merit.’

The action is, therefore, well brought, under the Banking Act. The plaintiff here pleads the facts. He was not required to label his suit. He has recovered on these facts, which this Court is to take as true, and which, besides, are without contradiction. The learned counsel for the appellants nowhere in his Brief suggests a single change of pleading on the part of the plaintiff, that is, or could be, required under the Banking Act. Every thing there required has been set up in the complaint, every thing set up in the complaint has been proven by the evidence and found by the Court. What else can be asked?

It comes, then, that this Court is asked by the plaintiffs in error, to reverse this judgment, where, both pleading and proof strictly come up to every requirement of the Banking Act, because, on the trial, the there plaintiff took the position, in argument (fol. 46) that the action could be maintained as one of deceit, at common law. And before the decision of this Court in the Yates case, the cases so held.

Mason v. Moors, 4 Lawyers Reports, New Series, pp. 597, 605.

Prescott v. Haughey, 65 Fed. Rep., 653, 655, 659.

As to this, the Appellate Division (and the Court of Appeals by its affirmance on the opinion below) says (fol. 100), "a right decision will 'not be reversed merely because a wrong reason 'has been assigned therefor. There is no claim 'or pretense by defendants that they have been 'prejudiced by the theory followed in the Court 'below.'"

If reversal should here be had and a new trial ordered, the defendant in error, going back to the Trial Court, then claiming that the action is one under the Banking Act, and not for deceit at common law, putting in precisely the same evidence, and securing precisely the same findings of law, and of fact, without a word of change even of his pleading, would then be entitled to the same judgment here presented.

I cannot think that any useful purpose would be subserved by any such action.

As to the other assignments of error, other than those involving this single question of whether the action is governed by the Banking Act, and is well brought and proven thereunder,—they relate to sufficiency of pleading, admissibility of evidence, and matters exclusively for the State Courts, and need not be here considered.

The motion should be granted because the appeal is frivolous, and the judgment affirmed.

Saratoga Springs, N. Y.,

January 3", 1910.

EDGAR T. BRACKET.

Of Counsel for the Defendants in Error, for the Motion.

Office Supreme Court U. S.
FILED
APR 11 1910
JAMES H. MCKENNEY,
Clerk.

Supreme Court of the United States

OCTOBER TERM, 1909

No. ~~102~~ ~~103~~ 171

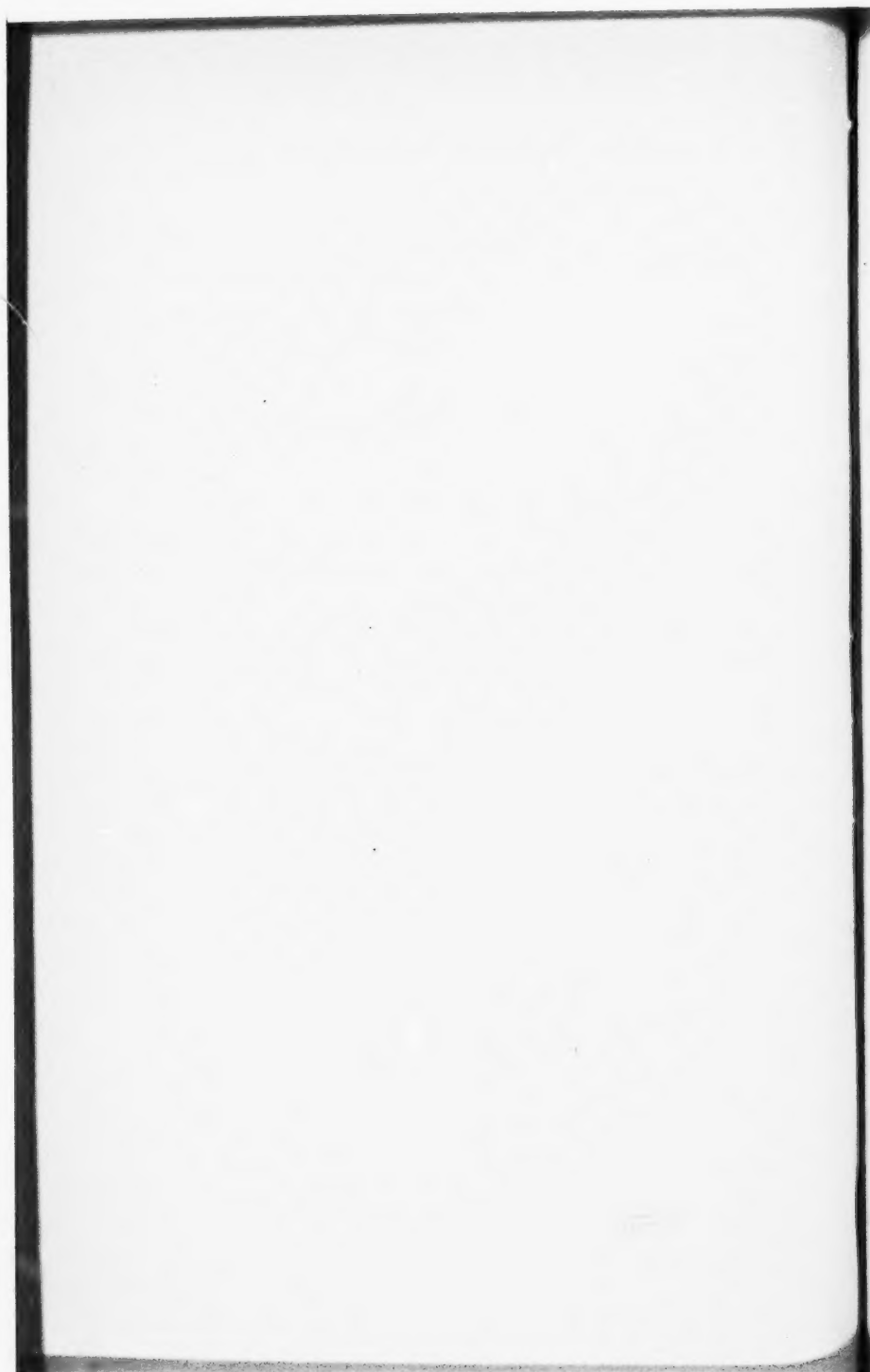
CASSIUS B. THOMAS, WILLIAM D. EDDY
AND EDGAR D. STARBUCK,
Plaintiffs in Error,

vs.

WILLIAM C. TAYLOR,
Defendant in Error.

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR IN OPPOSITION TO MOTION TO DISMISS AND AFFIRM

NASH ROCKWOOD,
Counsel for Plaintiffs in Error,
378 Broadway,
Saratoga Springs, N. Y.



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1909.

No. 702.

CASSIUS B. THOMAS, WIL- LIAM D. EDDY and EDGAR D. STARBUCK, Plaintiffs in Error, vs. WILLIAM C. TAYLOR, Defendant in Error.	}
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BRIEF FOR PLAINTIFFS IN ERROR IN OP- POSITION TO MOTION TO DISMISS AND AFFIRM.

In the year 1904 the plaintiffs in error were directors of the Citizens National Bank of Saratoga Springs, N. Y. As such directors they attested a report of the 6th day of April, 1904, showing the condition of such bank at the close of business on the 28th day of March, 1904. The report which was published and attested by them as aforesaid, is printed at pages 38 and 39 of the record, and was as follows:

REPORT of the condition of the Citizens National Bank, at Saratoga Springs, in the State of New York, at the close of business, March 28, 1904:

Resources.

Loans and Discounts.....	\$633,166 38
Overdrafts, secured and unsecured.	2,665 77
U. S. Bonds to secure circulation...	100,000 00
U. S. Bonds to secure U. S. deposits.	160,000 00
Premiums on U. S. bonds.....	20,800 00
Stocks, securities, etc.....	225,342 47
Banking house, furniture and fixtures	33,000 00
Other real estate owned.....	34,906 72
Due from National Banks (not reserve agents)	1,114 84
Due from state banks and bankers.	8,643 46
Due from approved reserve agents.	76,120 17
Internal revenue stamps	308 89
Checks and other items.....	244 50
Exchanges for clearing house	1,495 52
Notes of other National Banks.....	8,370 00
Fractional paper currency, nickels and cents	1,763 82
Lawful money reserve in Bank, viz:	
Specie \$29,780 10	
Legal tender notes ... 33,492 00	
	63,272 10
Redemption fund with U. S. Treasurer (5 per cent. of circulation)..	5,000 00
Total	\$1,376,174 64

Liabilities.

Capital stock paid in.....	\$100,000 00
Surplus fund	50,000 00
Undivided profits, less expenses and taxes paid	13,456 75
National Bank notes outstanding...	95,800 00
Due to other National Banks.....	31,418 68

Due to state banks and bankers....	613 55
Due to Trust Companies and Sav- ings banks	2,814 10
Dividends unpaid	25 00
Individual deposits sub- ject to check.....	\$225,788 15
Demand certificates of deposit	686,256 18
Cashier's checks out- standing	2 23
United States deposits.	160,000 00
	<hr/> 1,072,046 56
Notes and bills re-discounted.....	10,000 00
	<hr/>
Total	\$1,376,174 64

STATE OF NEW YORK, }
County of Saratoga. } ss:

I, J. H. DeRidder, Cashier of the above named bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

J. H. DeRIDDER,
Cashier.

Subscribed and sworn to before me
this 6th day of April, 1904.

W. H. Waterbury,
Notary Public.

Correct—Attest: C. B. Thomas, E. D. Starbuck,
W. D. Eddy, Directors.

In June, 1904, the defendant in error purchased thirty shares of the capital stock of said bank at \$160 per share and the certificates were delivered to the defendant in error on the 27th day of that

month. This stock was purchased in the open market through one Brownell (page 42). The purchase was made by one William R. Waterbury, brother-in-law of the defendant in error. The circumstances attending this purchase, as claimed by the defendant in error, were thus described in the evidence. William C. Taylor, the defendant in error, was called as a witness in his own behalf and testified in substance as follows:

That in or about the month of May, 1904, he had a conversation with William R. Waterbury, his brother-in-law, relating to an opportunity to purchase stock of the Citizens National Bank (pp. 28-29). That he subsequently wrote Mr. Waterbury:

“Find out for me, please, how many
“shares of that bank stock there is for sale
“at 160. And also tell me what you think
“the prospects are for future.” (P. 30.)

Mr. Waterbury replied as follows:

“The quantity is twenty shares with a
“possibility of thirty. After June 15th if
“not sold the owner will hold until the
“July dividend is paid, then offer for sale
“again, I think it a good investment and
“would not think of parting with my
“stock for the price named,” (P. 30).

That he had a conversation with Mr. Waterbury in which Mr. Waterbury said that the report of the bank showed that it had a capital of \$100,000; surplus of \$50,000, and undivided profits of about \$13,000. That he believed the statement thus made to him by Mr. Waterbury and relied upon it, and on

May 31, 1904, mailed Mr. Waterbury checks aggregating \$4800 with instructions:

“ You may purchase the thirty shares if
“ for sale. I have drawn checks so as to
“ make it right either way (20 or 30
“ shares), (P. 31.)

That he afterwards received from Mr. Waterbury the certificates of bank stock amounting to thirty shares (p. 32).

During all of these transactions the defendant did not personally confer with any of the officers of the bank or the plaintiffs concerning the stock, nor did he see the published report in question, nor did he make any inquiries whatever except such as he testified were communicated to him by Mr. Waterbury.

It is apparent from the defendant's own testimony that he relied wholly upon Mr. Waterbury in this matter. There is no statement that he directed Mr. Waterbury to investigate the condition of the bank for him, nor anything to show that Mr. Waterbury acted in any other way than in a friendly capacity without remuneration. He was not an agent of the defendant until he received the letter of May 31, 1904, inclosing checks for \$4800 and directing him to purchase thirty shares, and he then became an agent, if at all, simply in making the purchase of the stock.

We submit that there is no previous agency shown, and will discuss that later on.

On his cross-examination the defendant testified:

" I had my first talk with Mr. Water-
 " bury on the 24th of May, 1904. * * *
 " I can't give his words, but the substance
 " of it was that he had a chance to buy
 " some thirty shares of Citizens Bank
 " stock for 160 and that he considered it
 " a good investment. That it was worth 160
 " or more. It was paying four per cent
 " and five per cent semi-annually as inter-
 " est, and he could buy 20 or 30 shares.
 " That he had a lot of stock himself and
 " he called it worth 175, and he thought it
 " was a good thing for me to buy. He did
 " not say where he could buy it or from
 " whom he could buy it, or by whom it
 " had been offered to him. (P. 33).

The witness further testified with reference to
 his conversation with Mr. Waterbury:

" Q.—Was there anything more than
 " that? A. No, sir.

" Q.—Had you said anything to Mr.
 " Waterbury before he spoke to you about
 " it? A. No, sir.

" I had no money then of my own await-
 " ing investment, but had some money of
 " others. I believed what Mr. Waterbury
 " said to me about the stock and believed
 " his statement to be true. I have always
 " found the statements made by him to be
 " true; I relied upon them; he was my
 " brother-in-law and was occasionally at
 " my house. I have conferred with him
 " about business matters quite frequently,
 " and would not be surprised but that I
 " had made other investments on his judg-
 " ment.

" Q.—Did you make this on his judg-
 " ment? A. Almost entirely.

" Q.—Did you, prior to the purchase of
 " that stock, have a conference of any kind
 " with either, Starbuck, Eddy or Thomas?

" A. No, sir.

" I knew them to speak to, but I did not

"have any conference whatever or conversation, with any of these gentlemen until sometime in June; when I came up the 27th of June.

"Q.—Had you, prior to June 27, 1904, seen the published bank statement of the Citizens Bank? A. I think I had.

"Q. Will you swear that you had? A. I will not be positive.

"Q.—Will you swear to it as a fact?

A. I will not be positive.

"Q.—Have you any recollection of seeing one? A. I have a recollection of seeing one, but the date I do not remember.

"Q.—You do not know whether it was before or after June 27? A. I am pretty sure it was before.

"Q.—You can't swear to it? A. No, sir.

"Q.—Was it before you had purchased this stock or after? A. After.

"Q.—You saw no published bank statement until after you had purchased the stock? A. No, sir.

"Q.—Did Mr. Waterbury say anything to you about having seen the bank statement? A. I think so.

"Q.—Will you swear to it? A. Yes, sir.

"Q.—Is it a fact that he did say so? A. Yes, sir.

"Q.—What did he say? A. What I said a little while ago.

"Q. Repeat it. A. It showed that the capital stock was \$100,000; the surplus \$50,000; and the undivided profits over \$13,000.

"Q.—He said that the bank statement showed that? A. Yes, sir.

"He made that statement to me on May 24, 1904, I did not know the date of the last previous statement of the Bank. I interested myself to find out about the bank statement; I asked Mr. Waterbury to investigate and find out what he

"could; I was in Ilion and he was in Saratoga.

"Mr. Waterbury said that he investigated and that he had advised with several people, and after he advised with those several people he gave me the result of his investigation. This was in the letters which have been introduced in evidence. I was guided almost entirely by his judgment.

"Q.—Did you ascertain or know anything about the loans and discounts of the bank? A. No, sir.

"Q.—Did you care anything about it? A. I did not take pains to find out after what Mr. Waterbury told me, (Ps. 34, 35).

It will be observed that the defendant testified that Mr. Waterbury gave him the results of his investigations and that this result

"was in the letters which have been introduced in evidence."

The only letter from Mr. Waterbury introduced in evidence reads as follows:

"Dear Will:

"The quantity is twenty shares with a possibility of thirty. After June 15 if not sold, the owner will hold until the July dividend is paid, then offer for sale again. I think it a good investment and would not think of parting with my stock for the price named (P. 30).

There is nothing in this letter giving any result of any investigation; it merely states the opinion of Mr. Waterbury that he considers the stock to be a good investment.

Mr. Waterbury was not paid anything for his services in this matter, and was not in the plaintiff's employ (p. 35).

Before purchasing the stock the defendant did not write a letter to any officer, employee or agent of the bank, and had no conference of any kind with the plaintiffs (p. 36).

William R. Waterbury (the brother-in-law of the plaintiff) was called as a witness for the plaintiff and testified that he was a director of the First National Bank in Saratoga Springs. That sometime in May, 1904, he learned that twenty or thirty shares of the stock of the Citizens National Bank could be purchased at 160, and that he subsequently had a conference with the defendant with respect to this stock at his home in Ilion on May 24, 1904, (pp. 36-7). He relates this conversation as follows:

“ I said to him that I knew of a block of
 “ Citizens Bank stock that was for sale,
 “ either twenty or thirty shares; that it
 “ could be bought for 165, and that their
 “ last statement showed that they had a
 “ capital of \$100,000; surplus of \$50,000,
 “ and undivided profits of between \$13,-
 “ 000 and \$14,000. That they were paying
 “ dividends of 5 per cent and 4 per cent
 “ semi-annually, and that would give it a
 “ book value of 163 or 164, and that I
 “ would not take 175 for what I owned at
 “ that time.

“ As to the rest of the conversation, Mr.
 “ Taylor was on his way to the country;
 “ he was going to a funeral, or something,
 “ and I was going to take a train in the
 “ course of an hour and a half, and he
 “ made reply something like this—that he
 “ would think about it. That was the sub-
 “ stance of his reply, but the exact lan-
 “ guage I could not give, (P. 37).

He testified that prior to this conversation he had seen and examined the report of the bank which was published April 6, 1904, of the condi-

tion of the bank at the close of business on March 28, 1904, (pp. 37-8). That he believed it to be true and also believed it to be true when he wrote the letter which was introduced in evidence as a part of defendant's Exhibit No. 1 (p. 39).

It will be observed that the letter of Mr. Waterbury referred to, makes no reference whatever to the bank report (p. 30). He then related how he received the certified checks from defendant and purchased thirty shares of the stock and delivered it to the plaintiff (p. 40). He also said that in making the purchase of the stock he relied upon the correctness of the bank's statement (p. 40).

On cross-examination Mr. Waterbury testified that in May, 1904, he was associated in business with Cassius B. Thomas, one of the plaintiffs in error in this action. That at the time of the purchase Thomas was president of the bank, but that he did not consult with Mr. Thomas about it or did not ask him anything about the value of the stock. He was permitted to say that he had conferred with Mr. DeRidder, the Cashier of the Bank, and Mr. Waterbury, the teller, and formed a conclusion that

" what they both told me corroborated the
" statement that had been made" (P. 41).

(It is not shown definitely what Mr. DeRidder or Mr. Waterbury said to the witness Waterbury, and we submit that it was not material in any event, and could not have had any binding effect upon these plaintiffs in error.)

Mr. Waterbury did not confer with any of the plaintiffs, although their respective places of business are within a few hundred feet of his own (pp. 41-2).

The defendant then rested and **Charles D. Thurber** was called as a witness for the plaintiffs. Mr. Thurber testified that he was the cashier of the Citizens National Bank and that he was familiar with the method of keeping the books of the Bank, and with the methods that were in use on March 28, 1904, (fol. 237). That at request of plaintiffs' counsel he had carefully compared the books of the Bank at the close of business on March 28, 1904, with the statement thereof as published in the newspaper and referred to in this action, and that "the statement was a true statement of the condition as shown by the books," (pp. 44-5).

Both parties then rested and the motions and proceedings heretofore detailed followed.

It was claimed by the defendant in error that because the directors of the bank had received a letter from the Comptroller of the Currency referring to certain notes, which were considered by the Comptroller to be doubtful of collection, that these notes should not have been included as assets in the published report. The facts concerning this letter of the Comptroller were embodied in the following concession:

"It is conceded by the defendants" (plaintiffs in error here) "that between the 28th day of March, 1904, and the 30th day of June, 1904, there were no losses of consequence suffered by the Bank. That at least thirty days prior to the 28th day of March, 1904, the Comptroller of the Currency had called the attention of the Directors of the Bank, by letter, to the situation of the Bank, and that items * * * * * amounting to \$194,107.02 must be regarded as doubtful assets and that im-

“mediate steps should be taken to collect them or remove them out of the Bank; and that defendants had knowledge of such letter from the Comptroller of the Currency at the time that they attested the report. That of the \$194,107.02, above referred to, \$97,000 never has been realized.”

which appears on page 42 of the record.

The Court will observe that at the time of the attestation of the report and for three months thereafter the directors had received no notice from the Comptroller whatever except the letter referred to in the concession.

Subsequently, and on June 30th, 1904, the Comptroller ordered an assessment of \$100 per share upon the capital stock of the Bank, and this fact was also stipulated in the record as follows:

“It is admitted that on the 30th day of June, 1904, an assessment of \$100 per share had been ordered by the stockholders on the direction of the Comptroller, which was subsequently paid, and the plaintiff paid his assessment prior to the commencement of this action; and that the proceedings to make that a binding assessment were duly taken. And that notice from the Comptroller of the Currency to the Bank that its capital stock had become impaired by the amount of \$100,000, and that under the provisions of Section 5205 of the United States Revised Statutes such deficiency of the capital stock had to be made good by assessment upon the stockholders pro rata to the amount of the capital stock held by each, or the Bank would be placed in liquidation, was received by

" the Bank June 27th, 1904." (Page 33 of record.)

The defendant in error having paid the amount of his assessment on the shares of stock purchased by him as aforesaid, brought an action in the Supreme Court of the State of New York against the plaintiffs in error who thus attested the March report, to recover the sum of \$4800, the amount paid by him for said stock in the open market. The complaint in said action is set forth on pages 2-4 of the record and the answer of the plaintiffs in error is set forth on pages 4-8. A correct statement of the allegations of said complaint and answer are set forth in the brief of the defendant in error, submitted on this motion, and need not be repeated here.

The action was tried before the court without a jury on the 25th day of March, 1907, (page 27).

At the opening of the case counsel for the plaintiffs in error moved to dismiss the complaint for the following reasons:

" First—The action is brought as a common law action for deceit against three men conceded by the complaint to have been, at the time of the commission of the wrongs alleged directors of a National Bank, operating and conducting the same under the National Banking System at Saratoga Springs, N. Y., and under the United States laws relating thereto; that Sections 5207 and 5239 of the Revised Statutes of the United States are sections relating to the operation and management of National Banks, and the liability of directors and officers connected therewith, and provide within themselves an exclusive remedy for all violations of the provisions of the statute; the statement of counsel just

"made is that the directors are liable under the statute; while that may be so, it does not make them liable at common law in an action for deceit; that the National Banking Law provides an exclusive remedy for a violation of any of its provisions; there is no allegation in the complaint in this action that the defendants made or suffered to be made a false entry in any of the books of the bank; that the making of a false report as such—conceding the report to be false (which the defendants do not concede as a fact)—is not a violation of the National Banking Statute; that there must be the allegation of a false entry, either actively by the directors charged, or by some one with their knowledge, connived at by them.

"Second—There is a defect of parties defendant, in that the Citizens National Bank of Saratoga Springs, and John H. DeRidder, cashier of the Bank at the time, who signed the report, are not made parties to this suit.

"Third—The complaint upon its face, even assuming that a common law action for deceit could be maintained, does not state facts sufficient to constitute a cause of action, in that it shows that the plaintiff himself was guilty of contributory negligence in the purchase of his stock. The allegation of the complaint is that he purchased the stock in June, 1904, relying upon statements published of the condition of the bank on the 28th of March, 1904, or over two months prior to the purchase of his stock. There is no allegation in the complaint that the condition of the Bank in June, 1904, at the time he purchased the stock, was the same that it was on the 28th of March, 1904; that such allegation is a necessary and material ingredient of this cause of action, because there is no legal or other presumption to the effect that the condition of the Bank on the 28th of March,

“1904, was its condition in June, 1904;
 “but, on the contrary, the presumption is
 “otherwise, as the affairs of a bank are
 “constantly changing.”

The following colloquy then ensued between
 Court and counsel:

“Judge Van Kirk—I will deny the
 “third cause. I do not think the com-
 “plaint can be dismissed on the ground
 “that there was negligence on the part of
 “the plaintiff. I think he might rely up-
 “on the last bank statement issued.

“Judge Rockwood—The National Bank-
 “ing Act contains within itself an exclu-
 “sive remedy for violations of that act,
 “and defines the liability of directors and
 “officers of national banks; and any cause
 “of action or remedy sought to be en-
 “forced against a director or officer by a
 “stockholder must be enforced in accord-
 “ance with the provisions of the National
 “Banking Law, and the common law ac-
 “tion for deceit cannot be maintained un-
 “der the circumstances set forth in this
 “complaint.

“Judge Van Kirk—That no liability on
 “account of the acts of a director or offi-
 “cer of a national bank exists, except such
 “liability as is stated in the statute?

“Judge Rockwood—In the National
 “Banking Law.

“Senator Brackett—The plaintiff
 “brings the action for deceit precisely in
 “the form, and on the ground, that he
 “would have brought it, or might have
 “brought it, if they had issued a prospect-
 “us that was false and that was not at all
 “required by the National Banking Law.

“Judge Van Kirk—The defendant
 “claims, and the plaintiff concedes, that
 “this is not an action to recover upon any
 “liability stated in the National Banking
 “Act against a director or officer of a na-
 “tional bank.”

Decision upon the motion was reserved and the same was subsequently denied with an exception to the defendants. (Ps. 27 and 28).

William C. Taylor, the plaintiff, and **William R. Waterbury**, his brother-in-law, were sworn as witnesses for the defendant and during the course of the examination of such witnesses the following admissions were made by the parties:

1—"It is admitted that on the 30th day of June, 1904, an assessment of \$100 per share had been ordered by the stockholders on the direction of the Comptroller, which was subsequently paid, and the plaintiff paid his assessment prior to the commencement of this action; and that the proceedings to make that a binding assessment were duly taken. And that notice from the Comptroller of the Currency to the bank that its capital stock had become impaired by the amount of \$100,000, and that under the provisions of Section 5205 of the United States Revised Statutes such deficiency in the capital stock had to be made good by assessment upon the stockholders pro rata to the amount of the capital stock held by each, or the bank would be placed in liquidation, was received by the bank June 27, 1904." (See page 33 of the record.)

2—"It is conceded by the defendants (plaintiffs in error here) that between the 28th day of March, 1904, and the 30th day of June, 1904, there were no losses of consequence suffered by the bank. That at least thirty days prior to the 28th day of March, 1904, the Comptroller of the Currency had called the attention of the directors of the bank, by letter, to the situation of the bank, and that items (marked in the record "which I hold in my hand" (Senator Brackett's hand), amounting to

\$194,107.02, must be regarded as doubtful assets, and that immediate steps should be taken to collect them or remove them out of the bank; and that defendants (plaintiffs in error here) had knowledge of such letter from the Comptroller of the Currency at the time that they attested the report. That of the \$194,107.02, above referred to, \$97,000 never has been realized," (pp. 42 and 43 of the record).

At the close of the case of defendant in error, counsel for the plaintiffs in error moved for a nonsuit and for a dismissal of the complaint, upon the following grounds:

"First.—The provisions of the National Banking Act, particularly sections 5239 and 5307 of the Revised Statutes, provide an exclusive remedy for any violation by a national bank director of his duty as such director, or any malfeasance or non-feasance in office; and that the common law action of deceit cannot be maintained, as is sought to be maintained in this action. I urge in that behalf all of the matters urged upon the original motion for a dismissal of the complaint. This is practically a renewal of the motion made at the commencement of the case.

Second.—The plaintiff has failed to make out a cause of action in that he has failed to prove actual, intentional fraud on the part of the defendants, or any of them, or any intent to deceive, and there is an entire want of proof of actual or intentional fraud of any kind or character upon which a common law action for deceit can be based.

Third.—There is no proof before the Court

that the defendants, or any one acting for them, or under their direction, made any false entry in any report of the bank's condition, and the making of a false report is not a violation of the National Banking Act.

Fourth.—There is an entire absence of any evidence showing fraud or deceit on the part of any of the defendants, and the case is lacking in proof of that necessary element.

Fifth.—No evidence has been produced to show that the bank statement as issued was not a correct and true transcript or copy of the books of the bank.

Sixth.—The evidence affirmatively shows that the plaintiff Taylor did not in any wise rely upon the bank statement, and that he was not led to purchase his stock through any representation made by the defendants, or any of them; but on the contrary he relied upon the judgment of his brother-in-law, W. R. Waterbury, in that respect, and if Mr. Waterbury erred in his judgment of the value of the bank stock, it has no binding effect upon these defendants.

Seventh.—Mr. Waterbury is not shown to have been the agent of Mr. Taylor in any way, or to have been placed in any situation by which any acts of Mr. Waterbury in examining the bank statement, or in forming an opinion as to the value of the bank stock, to be binding upon these defendants.

The Court—I will entertain the motion and pass upon it with the rest of the case.

Motion subsequently denied with an exception to the defendants," (pp. 43-4).

It was conceded (page 45) that the items in the statement had not been charged off prior to the published statement of March 28th, 1904, and said items were carried upon the books and appear in the statement, and were of the sum of \$194,107.02, the same as referred to in the former concession (page 45).

The plaintiffs in error then rested and their counsel renewed the motion for a non-suit on all of the grounds which had been previously urged; decision was reserved and such motion was subsequently denied with an exception to the plaintiffs in error (page 45).

The trial court subsequently rendered its opinion, concluding, "Under the proof and the rule of damages, I am bound to hold that the plaintiff has suffered damages as claimed, in the sum of \$4800 and interest from the time the stock was delivered, July 1st, 1904," (page 52).

By consent of parties, the plaintiffs in error submitted proposed findings of fact and conclusions of law which were passed upon by the trial justice, which appear at pages 9-18.

The trial court made and filed its decision which appears at pages 19-21 and a synopsis of which is set forth in the brief of the defendant in error submitted on this motion.

Judgment was thereupon entered in the Saratoga County Clerk's office in favor of the defendant in error and against the plaintiffs in error for the sum of \$5688 damages and \$111.19 costs, in all \$5799.19 (page 21).

The plaintiffs in error filed exceptions to the decision of the trial court and refusals to find as requested by the plaintiffs in error, which exceptions appear at length at pages 22-26.

Judgment was entered in the Saratoga County Clerk's office on the decision of the trial court on the first day of August, 1907, in favor of the defendant in error and against the plaintiffs in error, for the sum of \$5688 damages, and \$111.19 costs, making in all \$5799.19.

The plaintiffs in error appealed from said judgment to the Appellate Division of the Supreme Court of the State of New York, both upon questions of law and facts. The Notice of Appeal appears on page 1 of this record. On such appeal the Appellate Division of the Supreme Court made its order affirming such judgment, but reducing the amount of the recovery \$2000 and interest (page 52), and judgment of affirmance was thereupon entered in the Saratoga County Clerk's office for the sum of \$3,799.19 on the 25th day of March, 1908, (page 54). The plaintiffs in error thereupon appealed to the Court of Appeals of the State of New York, by Notice of Appeal dated April 30th, 1908 (page 55) and the Court of Appeals affirmed the said judgment entered upon the order of the Appellate Division as aforesaid and made its remittitur remitting the case to the Supreme Court for judgment to be entered in accordance with its order, on the opinion of Mr. Justice Cochrane in the Appellate Division (page 59); and judgment of affirmance on the remittitur of the Court of Appeals was entered in the Saratoga County Clerk's office on the 7th day of June, 1909, (page 61).

The opinion of the trial court appears at pages 47-52 and the opinion of the Appellate Division appears at pages 55-58.

The plaintiffs in error obtained a writ of error from the Supreme Court of the United States,

such writ being allowed on the 19th day of November, 1909, by Mr. Justice Harlan of this court. The petition for such writ appears at pages 61-63 and the assignment of errors filed by the plaintiffs in error appears at pages 63-65 and is as follows:

ASSIGNMENT OF ERRORS.

(1) In holding and deciding that, upon the matters and things in the complaint in the said cause set forth, an action as at common law for deceit could be maintained against the petitioners, defendants to the said complaint, and in the said cause.

(2) In not holding and deciding that the only liability, if any, of the said petitioners to the complaint in the said cause was upon and under the National Banking Act or Law of the United States, and especially Section 5239 of the Revised Statutes of the said United States.

(3) In holding and deciding that the said complaint sets forth an action as at common law for deceit.

(4) In holding and deciding that the supposed cause of action set forth in and by the said complaint is not governed and limited by the liability, if any, imposed upon the petitioners by the National Banking Act or Law aforesaid.

(5) In not holding and deciding that the petitioners were not liable to said complainant unless they, the petitioners, in attesting the certain report in the said complaint mentioned, did so with knowledge of its falsity in all or any of the particulars in the said complaint enumerated, and with the intent to deceive, and to violate the pro-

visions of the National Banking Act or Law aforesaid.

(6) In holding and deciding that the petitioners either had knowledge of the falsity of the said statements, or any of them, in the said report, or attested the same recklessly or without examination as to the truth thereof.

(7) In holding and deciding that the certain notice from the Comptroller of the Currency of the United States to the certain bank in the said complaint mentioned, of, to-wit: the 27th day of June, 1904, was an adjudication or notice that the capital of the said bank was impaired, or was evidence of such impairment.

(8) In holding and deciding that the certain notice or information from the Comptroller of the Currency of the United States to the certain bank in the said complaint mentioned, of, to-wit: the first day of March, 1904, was evidence that the certain assets in the said notice or information referred to as doubtful were, in fact, doubtful.

(9) In holding and deciding as matter of fact that the said report so alleged to have been attested by the petitioners was untrue in the particulars in the said complaint enumerated, or in any of them.

(10) In holding and deciding as matter of fact that there was no evidence showing, or tending to show, that the said report so alleged to have been attested by the petitioners was true in the particulars in the said complaint enumerated.

(11) In holding and deciding that the said report so attested by the petitioners was attested by them with the intention of causing the public, or any member thereof, to believe that the said bank in the said complaint mentioned was in the

financial condition appearing from the said report, or to invite the public, or any member thereof, to deal with the said bank or in its stock on the assumption that such condition in fact existed; the fact being that the said report was made by the cashier of the said bank and attested by the petitioners, as directors thereof, in response to a call of the Comptroller of the Currency of the United States, and in obedience to, and compliance with, the laws of the United States in that behalf.

(12) In holding and deciding that, in buying the stock of the said bank aforesaid, the complainant, respondent in the said Court of Appeals, relied upon the report aforesaid and the statements therein contained as emanating from the petitioners.

(13) In holding or deciding that there was sufficient, or any, legal evidence showing, or tending to show, that the statement of the condition of the said bank aforesaid, as made in the report aforesaid, was in fact not true in the particulars in the said complaint enumerated, or any of them.

(14) In not holding and deciding that there was an entire absence of any evidence showing, or tending to show, fraud or deceit, or attempt at either, on the part of the petitioners in attesting the said report aforesaid.

(15) In not holding and deciding that the petitioners were not liable to the said complainant, respondent as aforesaid, by reason of the attestation of the said report aforesaid, made in pursuance of a call by the Comptroller of the Currency of the United States, and intended to show, and in fact showing, the condition of the bank aforesaid at the close of business on the 28th day of March, 1904, according to the books, accounts and records of the said bank.

(16) In not deciding and determining the questions involved in the said action in accordance only with the provisions, true intent and meaning of the National Banking Act or Law of the United States aforesaid, and in deciding and determining the said questions in assumed accordance with the principles of the common law, and in erroneously deciding the same in accordance with such principles.

(17) In not reversing the judgment of the said Supreme Court of the State of New York and the Appellate Division thereof, and in affirming the same.

The plaintiffs in error gave a supersedeas bond in the sum of \$10,000 with the United States Fidelity & Guaranty Company as Surety, required by Mr. Justice Harlan in his allowance of the writ. Such bond appears at page 66 of the record.

The writ was duly issued by James H. McKenny, Esq., Clerk of the Supreme Court of the United States, on the 2nd day of December, 1909, (page 69) and a citation was duly issued by Mr. Justice Harlan on the 2nd day of December, 1909, (page 70).

Copies of the petition for the writ and of the assignment of errors, and the supersedeas bond and writ of error and citation, were duly served upon the counsel for the defendant in error and an admission of service given by counsel for the defendant in error.

The Clerk of the County of Saratoga, with whom the record as remitted by the Court of Appeals remains, duly made return to such writ (page 71) and transmitted the complete record and proceedings in the case to the clerk of this court on the 8th day of December, 1909.

The transcript of the record has been printed by

the clerk of this court and a copy thereof served on the counsel for the defendant in error.

Counsel for the defendant in error now moves to dismiss and quash the writ of error for want of jurisdiction and because he claims that the writ is irregular and insufficient. Defendant's counsel also moves to affirm the judgment of the Supreme Court of the State of New York, claiming that the writ of error was taken for delay only and that the question upon which it is claimed that jurisdiction depends is so frivolous as not to require further argument.

The motion should be denied.

POINTS

I

This Court has jurisdiction.

The action was brought by the defendant in error to recover damages claimed to have been sustained by him by reason of the attestation of a published report showing the condition of the Citizens National Bank of Saratoga Springs, N. Y., by the plaintiffs in error on the 6th day of April, 1904, showing the condition of said bank at the close of business on the 28th day of March, 1904.

The report was made and attested by the plaintiffs in error as directors, in pursuance of the requirements of Section 5211 of the Revised Statutes of the United States.

As was said by Mr. Justice White in *Yates vs. Jones National Bank*, 206 U. S. 158-176, "The National Bank Act imposes upon directors duties which would not rest upon them at common law,

"and that among such duties is the furnishing to
 "the Comptroller of the Currency reports concern-
 "ing the condition of the bank and the publication
 thereof."

In the same case at page 179, Mr. Justice White,
 writing for the court, further says:

"The civil liability of National Bank
 "directors, then, in respect to the making
 "and publishing of the official reports of
 "the condition of the bank, a duty solely
 "enjoined by the statute, being governed
 "by the National Bank Act, it is self-evi-
 "dent that the rule expressed by the stat-
 "ute is exclusive, because of the elemen-
 "tary principle that where a statute
 "creates a duty and prescribes a penalty
 "for non-performance, the rule prescribed
 "in the statute is the exclusive test of
 "liability.

"Farmers & M. Nat. Bank v. Deering,
 "91 U. S., 29, 35, and cases cited."

All that is necessary to sustain jurisdiction un-
 der the present writ is that the record shall show
 that the federal right was claimed in the state court
 in such form as to refer it to that court for deci-
 sion.

Upon the trial the plaintiffs in error moved for
 a dismissal of the complaint upon the ground that
 the action was brought as a common law action for
 deceit, such motion being as follows:

"First.—The action is brought as a common
 law action for deceit against three men con-
 ceded by the complaint to have been, at the
 time of the commissions of the wrongs al-
 leged, directors of a national bank, operat-
 ing and conducting the same under the Na-
 tional Banking System at Saratoga Springs,
 N. Y., and under the United States laws re-

lating thereto; that sections 5207 and 5239 of the Revised Statutes of the United States are sections relating to the operation and management of national banks, and the liability of directors and officers connected therewith, and provide within themselves an exclusive remedy for all violations of the provisions of the statute; the statement of counsel just made is that the directors are liable under the statute; while that may be so, it does not make them liable at common law in an action for deceit; that the National Banking Law provides an exclusive remedy for a violation of any of its provisions; there is no allegation in the complaint in this action that the defendants made or suffered to be made a false entry in any of the books of the bank; that the making of a false report as such—conceding the report to be false, (which the defendant does not concede as a fact)—is not a violation of the National Banking Statute; that there must be the allegation of a false entry, either actively by the directors charged, or by some one with their knowledge, connived at by them," (p. 27).

The counsel for the plaintiffs in error further contended (page 28) that the National Bank Act contains within itself an exclusive remedy for violations of the act and defines the liability of directors and officers of national banks; and any cause of action or remedy sought to be enforced against a director or officer by a stockholder must be enforced in accordance with the provisions of the National Bank law, and a common law action for deceit cannot be maintained under the circumstances set forth in this complaint.

Counsel for the defendant in error than stated (page 28) *"the plaintiff brings the action for deceit precisely in the form and on the ground that he would have brought it, or might have brought it, if they had issued a prospectus that was false and that was not at all required by the Banking Law."* Judge Van Kirk, after hearing counsel and their respective claims, remarked (page 28).

" The defendant claims and the plaintiffs concede, that this is not an action to recover upon any liability stated in the National Banking Act against a director or officer of a national bank."

At page 43 counsel for the plaintiff in error moved for a non-suit and dismissal of the complaint at the close of the plaintiff's case upon the following grounds:

" First. The provisions of the National Banking Act, particularly sections 5239 and 5307 of the Revised Statutes, provide an exclusive remedy for any violation by a national bank director of his duty as such director, or any malfeasance or non-feasance in office; and that the common law action of deceit cannot be maintained, as is sought to be maintained in this action. I urge in that behalf all of the matters urged upon the original motion for a dismissal of the complaint. This is practically a renewal of the motion made at the commencement of the case.

Second. The plaintiff has failed to make out a cause of action in that he has failed to prove actual, intentional fraud on the part of the defendants, or any of them, or any intent to deceive, and there is an entire want of proof of actual or intentional fraud of any kind or character upon

which a common law action for deceit can be based.

Third. There is no proof before the Court that the defendants, or any one acting for them, or under their direction, made any false entry in any report of the bank's condition, and the making of a false report is not a violation of the National Banking Act.

Fourth. There is an entire absence of any evidence showing fraud or deceit on the part of any of the defendants, and the case is lacking in proof of that necessary element.

Fifth. No evidence has been produced to show that the bank statement as issued was not a correct and true transcript or copy of the books of the bank.

Sixth. The evidence affirmatively shows that the plaintiff Taylor, did not in any wise rely upon the bank statement, and that he was not led to purchase his stock through any representation made by the defendants, or any of them; but on the contrary he relied upon the judgment of his brother-in-law, W. R. Waterbury, in that respect, and if Mr. Waterbury erred in his judgment of the value of the bank stock, it has no binding effect upon these defendants.

Seventh. Mr. Waterbury is not shown to have been the agent of Mr. Taylor in any way, or to have been placed in any situation by which any acts of Mr. Waterbury in examining the bank statement, or in forming an opinion as to the value of the bank stock, to be binding upon these defendants.

The Court—I will entertain the motion and pass upon it with the rest of the case.

Motion subsequently denied with an exception to the defendants."

And at page 45 counsel for the plaintiffs in error renewed the motions for a non-suit upon all of the grounds previously urged. These motions were denied and the plaintiffs in error duly excepted.

In the requests to find submitted by the plaintiffs in error, the court was requested to find as follows:

“ 7th. That the common law action of deceit first sought to be maintained in this action, cannot be maintained; the plaintiff's remedy, if any, being exclusively governed by, and the defendant's liability tested by the provisions of Section 5239 of the Revised Statutes of the United States known as the National Banking Act,” which was refused, (p. 17).

To which the plaintiffs in error duly excepted (page 24, paragraph 14).

In the requests to find submitted to the trial court by the plaintiffs in error was the following:

“ 16th. That it is conceded herein by the plaintiff that this is not an action to recover upon any liability stated in the National Banking Act against a director or officer of a national bank,” (p. 18).

which was found; also the following request:

“ 17th. That this action is not brought to enforce a liability of the defendants as directors of a national bank, in accordance with the provisions of the National Bank Act, but is a common law action for deceit.”

which was found.

Section 709 of the Revised Statutes of the United States provides as follows:

"A final judgment or decree in any
 "suit in the highest court of the State *
 " * * * * * where any title
 "right, privilege or immunity is
 "claimed under the constitution, or any
 "treaty or statute, or commission held, or
 "authority exercised under the United
 "States, and the decision is against the
 "title, right, privilege or immunity
 "specially set up or claimed by either
 "party under such constitution, treaty,
 "statute, commission or authority, may
 "be re-examined and reversed or affirmed
 "in the Supreme Court upon a writ of
 "error; the writ shall have the same effect
 "as if the judgment or decree complained
 "of had been rendered or passed in a
 "court of the United States."

It will thus be seen that the plaintiffs in error
 raised the federal question on the trial in the state
 court and claimed the immunity provided in section
 5239 of the Revised Statutes of the United States
 relating to directors of national banks and their
 liability for acts done in violation of the statute,
 which section is as follows:

"If the directors of any national banking
 "association shall knowingly violate, or
 "knowingly permit any of the officers,
 "agents or servants of the association to vi-
 "olate any of the provisions of this title, all
 "the rights, privileges and franchises of the
 "association shall be thereby forfeited. Such
 "violation shall, however, be determined
 "and adjudged by a proper circuit, district,
 "or territorial court of the United States, in
 "a suit brought for that purpose by the
 "Comptroller of the Currency, in his own
 "name, before the association shall be de-
 "clared dissolved. And in cases of such vio-

“ lation, every director who participated in
 “ or assented to the same shall be held liable
 “ in his personal and individual capacity for
 “ all damages which the association, its
 “ shareholders, or any other person, shall
 “ have sustained in consequence of such vio-
 “ lation.”

II

Although the motion is to dismiss and quash the writ of error for want of jurisdiction and because, as claimed in the notice of motion, the writ of error is irregular and insufficient, no reasons are stated either in the notice of motion or in the brief of counsel for defendant in error to show wherein or why the writ of error is irregular or insufficient, or that there is want of jurisdiction.

We submit that what has been said under the previous point is sufficient to show that this Court has jurisdiction, and no reasons being assigned by the defendant as to wherein or how the writ is irregular and insufficient, it is unnecessary to say anything in answer to that part of the motion.

III

To justify a motion to affirm under Rule VI there must be a motion to dismiss coupled with at least some color of right to a dismissal.

Davies v. Corbin, 113 U. S., 687-689.

Whitney v. Cook, 99 U. S., 607.

Chanutte City v. Trader, 132 U. S., 210-213 and cases cited.

IV

The decision of the United States Supreme Court in *Yates v. Jones National Bank*, 206 U. S., 158, has settled the law of this case adversely to defendant's contention.

In many of the states of the Union there has been a conflict of opinion concerning the right to maintain a common law action for deceit against directors of a national bank. That such action could be maintained was held in

Gerner vs. Mosher, 58 Neb., 135.

Prescott vs. Haughey, 65 Fed. Rep., 653, 659.

Gerner vs. Yates, 61 Neb., 100.

Merchants National Bank vs. Thomas, 11 Ohio Decisions, 632.

Barnes vs. Swift, 3 Ohio Decisions, 688.

Whereas the right to maintain such action is questioned in the late case of

Mason vs. Moore, 73 Ohio St., 275,

also reported with elaborate note in

Vol. 4, L. R. A., N. S., at page 597.

There are also decisions in the State of New York authorizing the maintenance of such action.

Yates vs. Jones National Bank, *supra*, settles the law upon the subject and in passing upon the previous diversity of judicial opinion concerning it, Mr. Justice White wrote as follows:

“ And general consideration as to the
 “ spirit and intent of the National Bank Act
 “ (*Easton v. Iowa*, 188 U. S., 220; *Davis v.*

“ Elmira Sav. Bank, 161 U. S., 275), also
 “ render necessary the conclusion that the
 “ measure of responsibility concerning the
 “ violation by directors of express commands
 “ of the National Bank Act is, in the nature
 “ of things, exclusively governed by the spe-
 “ cific provisions on the subject contained in
 “ that act. Thus, a contrary conclusion
 “ would lead to a varying measure of respon-
 “ sibility in the several states in which the
 “ question of liability might arise, depend-
 “ ing upon the conceptions of the state courts
 “ of last resort as to the meaning of the act
 “ of Congress imposing the duty. Hence, it
 “ would follow that the same provision of
 “ the statute might mean one thing in one
 “ state and a different thing in another. The
 “ confusion which would result is aptly il-
 “ lustrated by a review made by the Supreme
 “ Court of Ohio in the recent case of *Mason*
 “ *v. Moore*, 73 Ohio St., 275, of the conflict-
 “ ing state adjudications as to the proper
 “ rule to be applied to fix the liability of
 “ bank directors to third persons in an ac-
 “ tion of deceit at common law. The frustra-
 “ tion of the public policy embodied in the
 “ national bank system by the crippling of
 “ the usefulness of such institutions, which
 “ would result from holding that directors,
 “ in performing the duties imposed upon
 “ them by the National Bank Act, might be
 “ held liable civilly, not by the standard of
 “ conduct which the act provides for a viola-
 “ tion of its express commands, but by an-
 “ other and different one, is apparent. Un-
 “ der such a conception it might well be that
 “ prudent and responsible persons would de-

“ cline to assume the discharge of the duties
 “ imposed by the statute because of the haz-
 “ ard of an uncertain pecuniary liability
 “ which the statute imposing the duty did
 “ not contemplate.

“ The civil liability of national bank di-
 “ rectors, then, in respect to the making and
 “ publishing of the official reports of the con-
 “ dition of the bank, a duty solely enjoined
 “ by the statute, being governed by the Na-
 “ tional Bank Act, it is self-evident that the
 “ rule expressed by the statute is exclusive,
 “ because of the elementary principle that
 “ where a statute creates a duty and pre-
 “ scribes a penalty for non-performance, the
 “ rule prescribed in the statute is the exclu-
 “ sive test of liability.”

In substance, the Yates case holds that the com-
 mon law action for deceit can not be maintained
 by third persons against the directors of a na-
 tional bank for any violation of the provisions of
 the National Banking Law.

That this action was intended to be, and is a
 common law action for deceit, and that it has been
 so treated both by Court and counsel throughout
 the trial, the following quotations from the rec-
 ord will show.

In answering the motion made by counsel for
 plaintiffs in error for a dismissal of the com-
 plaint, Senator Brackett said:

“ The plaintiff brings the action for deceit
 “ precisely in the form and on the ground
 “ that he would have brought it, or might
 “ have brought it, if they had issued a pros-
 “ pectus that was false and that was not at

“ all required by the National Banking
“ Law,” (p. 28).

And Judge Van Kirk, after hearing counsel and their respective claims, remarked:

Judge Van Kirk: “ The defendant
“ claims and the plaintiff concedes that this
“ is not an action to recover upon any lia-
“ bility stated in the National Banking Act
“ against a director or officer of a national
“ bank,” (p. 28).

And again in the opinion by Mr. Justice Van Kirk:

“ The defendants claim that this action
“ cannot be maintained; that the only action,
“ if any, available to the plaintiff is one un-
“ der the National Banking Act. * * *

“ But here the liability set forth in the
“ complaint is not created by statute. The
“ action is not a statutory action. It is the
“ common law action to recover damages for
“ deceit affecting the plaintiff only, not the
“ bank, or the stockholders generally, and
“ must be considered as such. *In the com-
“ plaint the plaintiff has set forth a cause
“ of action for deceit, and not a cause of ac-
“ tion under the statute.”* (P. 48).

And again Mr. Justice Van Kirk remarked:

“ There is nothing in the U. S. Statutes
“ that destroys the common law action for
“ deceit practiced by the directors of a na-
“ tional bank (Hardman vs. Bowen, 39 N.
“ Y., 198). If the plaintiff were attempting

“ to enforce a liability created by statute
 “ against directors of a National Bank we
 “ should have a different case than that at
 “ bar,” (p. 48).

These statements quoted from the opinion of the Trial Justice are directly opposed to the holding of the United States Supreme Court in

Yates vs. Jones National Bank, *supra*,

and all of the cases cited upon that subject in the opinion of the Trial Justice must be considered as overruled by this latest expression of the opinion of the highest court of our land.

The three plaintiffs in error are, and were at the time of the institution of the action and of the acts complained of, directors of a national bank; as such they accepted all of the responsibilities and were entitled to all of the immunities and privileges granted them by the National Bank Act. Their liability as directors, and the cases in which they can be held liable, is expressly defined by Section 5239 of the Revised Statutes of the United States which reads as follows:

“ Sec. 5239. Penalty for violation of this
 “ Title.

“ If the directors of any national banking
 “ association shall knowingly violate, or
 “ knowingly permit any of the officers,
 “ agents or servants of the association to vi-
 “ olate any of the provisions of this Title, all
 “ the rights, privileges and franchises of the
 “ association shall be thereby forfeited. Such
 “ violation shall, however, be determined
 “ and adjudged by a proper circuit, district,
 “ or territorial court of the United States,
 “ in a suit brought for that purpose by the

“ Comptroller of the Currency, in his own
 “ name, before the association shall be de-
 “ clared dissolved. And in cases of such vi-
 “ olation every director who participated in
 “ or assented to the same shall be held li-
 “ able in his personal and individual capac-
 “ ity for all damages which the association,
 “ its shareholders or any other person, shall
 “ have sustained in consequence of such vio-
 “ lation.”

This section provides an exclusive remedy for the recovery of damages from directors of a national bank based upon a loss resulting solely from the violation by such directors of a duty expressly imposed upon them by a provision of the National Banking Act.

This section also in the last sentence states the rule by which civil liability is to be determined. The section embraces in its scope all of the provisions of the United States Statutes as to what is required of banking officers and directors and states the circumstances and conditions under which civil liability of officers and directors arise. The statute prescribes a duty and also prescribes a penalty for non-performance, and such being the case violations of the National Banking Act are within the principle that where a statute creates a duty and prescribes a penalty for non-performance the rule prescribed in the statute is the exclusive test of liability.

Yates v. Jones National Bank, *supra*
 citing

Farmers & Mechanics National Bank v.
 Dearing, 91 U. S., 29, 35, and cases
 cited.

Where a liability is created by statute and the statute provides the remedy, that remedy is exclusive and must be followed.

Plank Road Co. v. Morley, 23 N. Y., 553, 554.

It is respectfully submitted that a careful reading of the statute shows that Section 5239 provides a rule and test of liability for violations of the act, and that from the principles laid down in the foregoing decisions that rule is exclusive.

The position here taken with respect to the defendant's inability to maintain this action was expressly taken at the trial by plaintiffs' counsel, and in the motions for a non-suit and a dismissal of the complaint made at the opening of the case and in a repetition of the same motions made at the close of the whole case. The plaintiffs expressly claimed before the Trial Justice, and claim here in this Court, that as directors of a national bank, qualified and acting as officers under the law of the United States, they are entitled to all of the immunities and privileges allowed them by the United States law, and that they are subject only in the performance of their duties to the liabilities expressly imposed upon them by the National Banking Act, and the laws of the United States. They have not conceded, and do not concede, that they can be sued in a State Court, and further assert that the right to maintain an action against them, if any, must be had in a proper court of the United States. The plaintiff has mistaken both his remedy and his forum.

It cannot now be claimed that this action is in accordance with Section 5239 of the United States Revised Statutes, or that it is to recover any lia-

bility for a violation of the provisions of the National Bank Act, for it was expressly stated and conceded on the trial by defendant's counsel, as shown by the foregoing quotations from the record, that the action was not brought for any violation of the National Bank Act, or any liability stated in such act (p. 28). The case was tried and decided as a common law action for deceit (pp. 28, 17, 18), and not for any liability arising from or under the National Bank Act.

(a)

The statement published April 6, 1904, showing the condition of the bank was made and attested and published in compliance with the provisions of Section 5211 of the United States Revised Statutes. The bank, being a National Bank, was obliged to make a published report when required to do so by the Comptroller. This is a duty different than any required at common law or by any statute of the State of New York, and the National Banking Act in this respect imposes a duty upon directors which is not imposed upon them at common law or by State Statute. This being so, and the statute itself providing a rule of liability, no different or higher rule of liability can be asserted than that imposed by the act itself in Section 5239.

National Banking Associations are the creatures of the Congress of the United States, and it cannot be doubted that the power resides exclusively in Congress to prescribe what acts may or may not be done by their officers in conducting their operations, and what shall be lawful and what unlawful, and having prescribed what acts shall be unlawful, to declare what penalties and

punishments therefor shall be visited upon the offenders.

In re Eno, 54 Fed. Rep., 669;
Bank vs. Dearing, 91 U. S., 29.

Section 5211 of the Revised Statutes of the United States, which is the section describing how a report shall be made to the Comptroller of the Currency, reads as follows:

“ Sec. 5211. (As amended 1877).

“ REPORTS TO COMPTROLLER OF
“ THE CURRENCY.

“ Every association shall make to the
“ Comptroller of the Currency not less than
“ five reports during each year, according to
“ the form which may be prescribed by him,
“ verified by the oath or affirmation of the
“ president or cashier of such association,
“ and attested by the signature of at least
“ three of the directors. Each such report
“ shall exhibit, in detail and under appropriate
“ heads, the resources and liabilities
“ of the association at the close of business
“ on any past day by him specified; and shall
“ be transmitted to the Comptroller within
“ five days after the receipt of a request or
“ requisition therefor from him, and in the
“ same form in which it is made to the Comptroller
“ shall be published in a newspaper
“ published in the place where such association
“ is established, or if there is no newspaper
“ in the place, then in the one published
“ nearest thereto in the same county, at
“ the expense of the association; and such
“ proof of publication shall be furnished as
“ may be required by the Comptroller. The

“ Comptroller shall also have power to call
 “ for special reports from any particular as-
 “ sociation whenever in his judgment the
 “ same are necessary in order to a full and
 “ complete knowledge of its condition.”

This is the only section relating to the attestation of reports by directors, and we submit that its plain intent is that the reports as published must contain an accurate statement of the condition of the Bank *as disclosed by the books thereof*. How could it be otherwise? Until doubtful assets (and every bank has them) are actually charged off as losses, the directors could not truthfully deduct them from the assets as shown by the books of the bank. Suppose a note to be under protest for non-payment and a suit in process for its collection and both the maker and endorsers of the note of doubtful responsibility—are the directors called upon to deduct that item from their report before it has been established that the note cannot be collected? Such a rule would make the directors guarantors that all of the promissory notes in the Bank included in the report under the heading “Loans and Discounts” were absolutely good, and that they would be all collected at the amount for which they were carried on the books. This is a situation contrary to common sense and not intended by the Banking Law.

The very case at bar is an example of the hazardous position occupied by directors and of the length to which parties will go to mulct them in damages. Here were three reliable business men acting as directors of a National Bank, who attested a report prepared and verified by the Cashier, with their signatures. The defendant,

living in a distant city, accepted the statement of his brother-in-law concerning the bank stock, and purchased thirty shares in the open market. The brother-in-law, whose place of business is situated within a few hundred feet of the places of business of the plaintiffs, and who was himself associated in business with the President of the Bank, Mr. Thomas (one of the plaintiffs in error), did not ask any of the directors about the Bank, but purchased the stock; then when an assessment was levied by the Comptroller of the Currency, he brings this action against the three plaintiffs directors, charging them with intentional fraud and deceit in having attested the Bank statement, which is conceded to be an exact copy of the books of the Bank as they existed on the day when the statement was made.

As said by Mr. Justice White in *Yates vs. Jones National Bank*, *supra*,

“ Under such a conception it might well
 “ be that prudent and responsible persons
 “ would decline to assume the discharge of
 “ the duties imposed by the statute because
 “ of the hazard of an uncertain pecuniary
 “ liability, which the statute imposing the
 “ duty did not contemplate.”

The concession upon which defendant relies, at page 73 of the record, does not change the situation. In fact, it states that the Comptroller of the Currency had written the directors of the Bank a letter at least thirty days prior to the 28th day of March, 1904, calling their attention to the situation of the Bank and to certain items amounting to \$194,107.02 which

“ must be regarded as doubtful assets, and
 “ that immediate steps should be taken to

“ collect them or remove them out of the
“ Bank.”

To one familiar with banking this is not an extraordinary proceeding. After an examination has been made of a bank by a bank examiner and his report sent to the Comptroller of the Currency, the Comptroller goes over the report in detail and writes to the directors his conclusion upon such report as to the situation of the bank, etc., calling attention to any assets which he considers doubtful and which must be, of course, either paid or removed from the bank. The fact that the Comptroller considers them doubtful does not make them absolutely bad assets or uncollectable assets. As shown in the case at bar, over \$97,000 of the items mentioned by the Comptroller were subsequently collected, and there is no evidence before the Court to show that all of the other items will not in fact be collected.

(b)

There is no evidence in this case of any intention upon the part of the directors to cheat or defraud any one; the case is wholly lacking in any evidence of intentional fraud upon the part of the plaintiffs; and indeed in the argument by counsel before the Trial Justice such evidence was apparently not deemed necessary, great reliance being placed by counsel at the trial and in his brief upon the very severe rules laid down in

Gerner vs. Mosher, 58 Neb., 135,

(now overruled in Yates vs. Jones National Bank, *supra*).

Can it be said that those items to which the Comptroller had called attention should have

been immediately charged off by the directors in March, 1904? Is it not more consummate with justice and the ordinary rules of business to say that they should, in any event, have been allowed a reasonable time within which to endeavor to collect the assets which the Comptroller had termed doubtful? Is there any rule of law requiring these directors to treat the items, to which the Comptroller had called attention, as uncollectable in their next published report after the receipt of the Comptroller's letter?

It will be seen from the record herein that a harsh rule of law has been applied to these plaintiffs, which the decision of the United States Supreme Court now overrules. They attested the report as shown by the books of the Bank; in this report loans and discounts were stated to be \$635,126.38. There is no claim that there were not promissory notes in the Bank of that amount, and the only contention of the defendant, as we understand it, is, that because the Comptroller had called attention to certain notes as doubtful, they should have been immediately charged off by the directors, and that their failure to do so constitutes intentional actionable fraud upon the defendant who bought the stock in the open market relying upon the published statement.

It is claimed by the defendant that the capital, surplus and undivided profits had been wiped out, but the only way in which they could have been wiped out was by the failure to realize upon the assets termed by the Comptroller to be doubtful. It is clear, however, that the Comptroller was not wholly correct in this, as the record concedes that over \$97,000 was collected, and, as stated above, there is no proof but that all of the other items could be collected, and certainly in an ac-

tion for fraud the court will not indulge a presumption that the balance of the items will not be collected. It was for the defendant to show by clear, unmistakable proof, if he relied upon fraud as the gravamen of his cause of action, that the other items which had not been realized upon when this case was tried, can never, in fact, be collected.

The Comptroller makes it his business to write letters calling the attention of the directors of a National Bank to any facts which he deems are disclosed by an examination, and it is a part of his duty to require them to endeavor to collect any assets which he may consider doubtful.

These directors were performing the full measure of their duty. If they had charged off the items to which the Comptroller had called attention, aggregating \$194,107.02 as uncollectable, they would have violated their duty and have stated a falsehood in the report, because \$97,000 has since been collected.

There is no claim or contention here of any kind that these plaintiffs falsified the books of the Bank, or that they did any affirmative act upon which intentional fraud could be predicated. They simply attested the report and at the time that they did so, knew that the Comptroller had called their attention to certain doubtful items which they were endeavoring to collect. Is this a "knowing" and intentional violation of any provision of the National Banking Act? We ask our opponents to point to any provision of the National Banking Act which has been thus violated, or to any provision of the United States law which requires the report to contain anything other than a summary of the condition of the Bank as disclosed by the books thereof.

Defendant does not claim any misapplication of

funds, conversion, embezzlement or violation of trust, but relies upon the mere fact that certain items to which the Comptroller had called attention had not been deducted from the loans and discounts previous to the determination of the correctness of the Comptroller's opinion

We further call the attention of the Court to the fact that in Revised Statutes, Section 5209, there is no penalty fixed to an association or its officers for making a false report, or to the President or Cashier for verifying such report. The penalty imposed by the statute is to the one who makes any false entry in any book, or record or statement of the association, and that penalty is applicable to any officer or agent of a Bank who actually makes the entry with intent to injure or defraud or deceive any agent appointed to examine the affairs of any such association.

Cochrane vs. U. S. (1895), 157 U. S., 293.

The degree of care to which Bank directors are bound is that which ordinary, prudent, and diligent men would exercise under similar circumstances, and in determining whether such care has been exercised, *the restrictions of the statute and the usages of the business should be taken into account.*

Briggs vs. Spaulding, 141 U. S., 132, 152 and cases cited.

In U. S. vs. Graves, 53 Fed. Rep., 634, (cited 139 F., 967; Reversed 165 U. S., 323 on another ground) it was held that

"The entry of loans and discounts in reports
"to the Comptroller does not guarantee the
"solvency of the makers of the paper, but is a
"statement that in truth and fact, at the date

“ named in the report, the Bank actually held
 “ and owned loans and discounts to the aggre-
 “ gate so reported.”

It is not claimed in the case at bar that the Bank did not actually and in fact hold and own the loans and discounts as reported, but it is claimed that they knew the notes were uncollectable and should have been charged off at the full amount claimed by the Comptroller; whereas, as stated above, over \$97,000 was subsequently collected.

In passing upon this question, Judge Woolson, in *U. S. vs. Graves, supra*, used the following language: (p. 646)

“ This Bank appears to have carried on
 “ their books from day to day certain loans
 “ and discounts under the heading of ‘Sus-
 “ pended Loans,’ and the testimony tends to
 “ show that these suspended loans had been
 “ theretofore carried on the books under the
 “ heading of ‘Loans and Discounts,’ but had
 “ been withdrawn therefrom as objectionable
 “ paper or loans having an improbability of
 “ payment, and were temporarily carried under
 “ the heading of ‘Suspended Loans,’ awaiting
 “ the action or decision of the board of direc-
 “ tors as to these suspended loans being with-
 “ drawn or charged off from the character of
 “ loans, and entered up as a loss on the profit
 “ and loss account. I do not understand the
 “ government seriously disputes the correct-
 “ ness of these suspended loans being placed
 “ in and made a part of the loans and dis-
 “ counts entry in the report to the Comptrol-
 “ ler; for the explanation given would still give
 “ these suspended loans the character of loans
 “ and discounts, and as being carried on the

" books of the Bank in good faith as a part
 " of their actual loans and discounts, though,
 " as I understand, temporarily, and for the
 " convenience of the Bank, entered on its books
 " under another heading, viz.: 'Suspended
 " 'Loans.' And therefore when defendant
 " added the aggregate of said suspended loans
 " account to the aggregate of loans and dis-
 " count account, as shown on the books, de-
 " fendant in so doing did not make a false
 " entry. He believed them to be loans and
 " discounts, and he was justified in so believ-
 " ing, and in good faith so reported them, and
 " under the circumstances did not as to that
 " particular make a false entry. The entry of
 " loans and discounts in reports to the Comp-
 " troller does not guarantee the solvency of the
 " makers of the paper, but it is a statement
 " that in truth and in fact, at the date named
 " in the report, the Bank actually held and
 " owned loans and discounts to the aggregate
 " therein reported.

" The evidence does not disclose that any
 " particular method or system of bookkeeping
 " is demanded of a National Bank. It is not
 " required to conform its headings of the vari-
 " ous accounts to any prescribed names, nor to
 " the names stated in the form of report pre-
 " scribed by the Comptroller; and therefore
 " when a report is called for, if the person
 " making it enters under the headings in the
 " prescribed form a true statement of the
 " Bank's condition on the day called for in
 " respect to the headings in said form, he has
 " fulfilled the demands of the law; and the ap-
 " plication of this proposition I have just illus-

"trated as to the item of suspended loans."

See also

Potter vs. U. S., 155 U. S., 438.

U. S. vs. Young, 128 Fed. Rep., 111.

Coffin vs. U. S., 156 U. S., 446.

Graves vs. U. S., 165 U. S., 324.

Twining vs. U. S., 141 Fed. Rep., 41.

The Court in its decision did not find that the plaintiffs knew that the report was false in any particular, or that they "knowingly violated" or knowingly permitted any violation of the provisions of the National Banking Act.

In the decision in *Yates vs. Jones National Bank*, *supra*, the defendants as directors of a National Bank are held to be only liable pursuant to Section 5239, U. S. R. S., for an intentional violation of any of the provisions of Title 62 of the United States Revised Statutes, which is the title relating to National Banks.

There is no allegation in the complaint, nor was there any proof offered, nor is there any finding of the Trial Justice, to show that these plaintiffs violated any of the provisions of Title 62 of the Revised Statutes of the United States. The action was brought, tried, argued and decided simply as an action for deceit at common law; and even if such action could be maintained, we contend that the proof failed to sustain it, as we shall point out later on in this brief.

As the plaintiffs' liability is measured by Section 5239, so it is confined by Section 5239 within the limits of Title 62 of the Revised Statutes of the United States. Section 5239 reads:

“ and in cases of such violation every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person shall have sustained in consequence of such violation.”

What is meant by the words “such violation”? Clearly, reading the whole section together, a violation of some one of the provisions of Title 62. The only provision in that title applicable to the case at bar is Section 5211 of the Revised Statutes which relates to reports to the Comptroller of the Currency. There is no provision in that section or any other that items to which the Comptroller has called attention must be regarded as “suspended loans” or deducted from the loans and discounts; nor is there any provision in that title requiring that the loans and discounts, to which the Comptroller may call attention, shall be charged off before there has been a reasonable time allowed within which to collect them.

In the case at bar the concession is:

“That at least thirty days prior to the 28th day of March, 1904, the Comptroller of the Currency had called the attention of the directors of the Bank, by letter, to the situation of the Bank, and that items * * * amounting to \$194,107.02 must be regarded as doubtful assets and that immediate steps should be taken to collect them or remove them out of the bank, etc.”

All of the matters complained of in the complaint herein occurred between February 28th and June 30th, a period of about four months.

The concession reads that the Comptroller had called the attention of the directors to the loans in question within thirty days prior to the date of the published report. The report was made on April 6th and stated the condition of the Bank at the close of business on March 28th. Is it reasonable to suppose that the directors should have charged off items aggregating over \$194,000 within thirty days after the receipt of the Comptroller's letter, and is their failure to so do evidence of the fact that these plaintiffs practiced intentional fraud and deceit upon the defendant?

To in a measure re-state our position, we contend that the communication from the Comptroller sent to the Bank some time during the thirty days prior to the 28th day of March, 1904, calling attention to certain notes, was not sufficient to show knowledge on the part of the plaintiffs in error that the report was false, or that the plaintiffs in error knowingly violated any of the provisions of the National Bank Act. This communication simply called the attention of the directors to certain items which will be found on page 74 of the printed case, and stated that such items must be regarded as doubtful assets and that immediate steps should be taken to collect them or remove them out of the Bank, (P. 42). This communication merely expressed an opinion on the part of the Comptroller as to the quality and character of the assets contained in such list, and gave instructions that they must be either collected or removed out of the bank. There is no proof in the case that the Comptroller's opinion or estimate of these assets was correct, and the Comptroller in his communication did not call for an immediate removal of them from the bank. The communication simply asked or required that immediate steps should be taken

to collect them or remove them out of the bank. It gave to the directors a discretion to do one of two things, and it also gave them a reasonable length of time in which to do it. It cannot be successfully or reasonably argued that this amount of paper, over \$194,000, and made by some fifteen or twenty people, could be collected in a day or a week, or that all of it could be collected in even a month. It takes time to do such things, and the communication of the Comptroller clearly contemplated that the directors should have a reasonable time in which to accomplish the one thing or the other. It was only a matter of about thirty days after such communication that the report was published (the 6th of April), showing the condition of the bank on the 28th day of March of the same year. The securities or notes to which the communication referred were on hand when the report was made and bears date, and there was no falsity or misrepresentation in including them in the loans and discounts. Such communication from the Comptroller did not amount to a judicial determination of the character or value of the securities included in the list.

There is no evidence to show that the Comptroller's estimate or opinion of the items referred to in his communication was correct, or how or why he formed such opinion; nor is there any evidence to show that the plaintiffs knew or had reason to believe that these items were worthless. Nor is there any evidence in the case to show that the assessment which was ordered on or about the 27th of June, 1904, was ordered because of these items.

The testimony shows that of such items over one-half has been collected, (p. 43). This fact goes to show that the Comptroller's estimate or opinion

was not entirely correct, if indeed there is anything in the case to show that it was correct to any extent. The plaintiffs were certainly, under the circumstances, not only authorized, but justified, in including such items in the loans and discounts, for the report which the Comptroller called for, and which the bank officers were required to make, called for a full and complete statement of the assets of the bank in regard to certain specified particulars, among others, the amount of loans and discounts.

(It must be borne in mind that the items referred to by the Comptroller are the only particulars urged or claimed on the trial wherein the report was false, or which caused any want or lack of value in the capital stock of the bank.)

The items being a part of the assets of the bank and on hand when the report was attested by the plaintiffs, and there being no proof to show that plaintiffs knew them to be worthless, and the Comptroller not having up to that time ordered any elimination or exclusion of them from the assets of the bank, it is respectfully submitted that the defendant has failed in a very material element to make out a case, viz., in not showing knowledge on the part of the plaintiffs that the items were worthless, and that the plaintiffs wilfully and knowingly attested a false report. The fact that the items amounting to \$194,000, to which the Comptroller had called the attention of the directors, appeared in the published report, and were known by the directors to appear in such report, does not prove that the plaintiffs knowingly violated the provisions of the National Bank Act, or indeed that they were guilty of any deceit.

Plaintiffs might, and undoubtedly did believe that some, and perhaps all of these items would be

collected. The collection of \$97,000 of such items after the Comptroller's communication certainly justified such a belief on the part of the plaintiffs.

The mere statement of the Comptroller in a letter is not evidence of the fact without some proof to show that his opinion or claim was true, or well founded. There is nothing in the case to show that these items had been the cause of any previous comment or unfavorable criticism on the part of the Comptroller, or how long they had been in the bank.

There is no proof to show that the condition of the bank was the same when the defendant purchased his stock as when the report was published, or that defendants knew the condition to be the same.

The Trial Court in its opinion claims that there is such proof because of the admission in the case that no losses of consequence were incurred by the bank between the 28th day of March, 1904, and the 30th day of June of that year, when the assessment was made, (p. 42). But it is respectfully submitted that this does not warrant such a conclusion. As above stated, there is nothing in the case to show whether the items to which the Comptroller called the attention of the directors were the cause of the Comptroller ordering the assessment; and moreover it affirmatively appears that of the amount of such items more than one-half has been collected.

Because there were no losses between March 28, and June 30, is no evidence that the plaintiffs knew that the same condition existed on March 28th that existed on June 30th, making necessary the assessment. The fact that they knew when the trial of this case was had, or even at any time after the 30th day of June (after the assessment had been

ordered and after the affairs of the bank had been examined) so that they could say, that the condition was the same on the 30th of June as on the 28th of March, is not and cannot be proof that they *knew* its condition on the 28th day of March. Such acknowledgement and admission made on the trial may have been based on an examination had, or knowledge acquired after the assessment had been ordered. The plaintiff's ought not to be held liable by any such mode of reasoning, or by anything in fact except convincing and satisfactory proof instead of mere inferences which may be wholly false.

V

The action is not brought to recover the liability imposed by the statute.

There is no allegation in the complaint that the action is brought to recover the penalty prescribed by Section 5239 of the United States Revised Statute; nor is there any allegation that the acts and statements set forth in the complaint constitute a knowing violation of the statute; nor is there any allegation in the complaint that the defendants knowingly violated the statute. On the contrary, the action is brought to recover upon an alleged common law liability, and was so conceded by defendants' counsel, and so held by the Court on the trial (P. 28, 48); see also complaint.

This cannot be done, as the statute prescribes the penalty, creates the duties, and the liability for a violation of them. The report having been attested and published, pursuant to the requirements of the U. S. Statutes, an action must be brought to

recover under the statute for a violation of the statute, and there must be an allegation that the defendants knowingly intended to violate the statute.

As is said in the opinion of the Court in *Yates v. Jones National Bank, supra*

“It thus becomes obvious that the National Bank Act imposes upon directors, duties which would not rest upon them at common law, and that among such duties is the furnishing to the Comptroller of the Currency reports concerning the condition of the bank, and the publication thereof.” (Page 176).

At page 177 the Court further says:

“Considering the text of the National Bank Act, as now embodied in the Revised Statutes, including Section 5239, we think the latter section affords the exclusive rule by which to measure the right to recover damages from directors, based upon a loss alleged to have resulted solely from the violation by such directors of a duty expressly imposed upon them by a provision of the Act, * * * And the last sentence ordains the rule by which civil liability is to be determined, by providing that ‘every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person shall have sustained in consequence of such violation.’ As the section thus comprehends all the express commands to do or not to do, as to directors, contained in the National Bank Act, and besides specifies the nature of the conduct of directors from which their civil liability for violation of such commands may arise, it results that liability cannot be entailed upon them by exacting a

“different and higher standard of conduct as regards such commands than that established by the statute without depriving directors of an immunity conferred upon them.

And at page 179, the Court adds:

“The civil liability of national bank directors, then, in respect to the making and publishing of the official reports of the condition of the bank, a duty solely enjoined by the statute, being governed by the National Bank Act, it is self-evident that the rule expressed by the statute is exclusive, because of the elementary principle that where a statute creates a duty and prescribes a penalty for non-performance, the rule prescribed in the statute is the exclusive test of liability. *Farmers' & M. Nat. Bank v. Deering*, 91 U. S., 29, 35; and cases cited. The error in the decision below becomes at once apparent when its correctness is tested by the rules that the statute is applicable and prescribes the exclusive test of liability.”

At Page 81 of the record the Trial Court found, in passing upon plaintiffs' (defendants in Trial Court) requests to find, that it was conceded by the plaintiff that the action was not brought to recover upon any liability stated in the national bank Act, and that it was not brought to enforce a liability of defendants (plaintiffs here) as directors of a national bank, in accordance with the provisions of the National Bank Act, but is a common law action for deceit. Again, on the trial, the Trial Justice stated, after motions made by the plaintiffs (defendants in Trial Court) to dismiss, that the defendants claim and the plaintiff concedes that this is not an action to recover upon any liability stated in the National Bank Act against a director of a national bank.

And, at page 28 the defendants' counsel stated, in reply to plaintiffs' counsel's contention, that the action was brought for deceit precisely in the form and on the grounds that he would have brought it, or might have brought it, if they had issued a prospectus that was false, and that was not at all required by the National Banking Law.

VI

The findings do not warrant or support the judgment.

The decision of the United States Supreme Court in the Jones National Bank case, *supra*, clearly is that it must be shown that the defendants *knowingly violated the statute*.

A

The findings in the case at bar are that

"They" (plaintiffs in error) "knew or *had reason to believe* that it was not correct, and they either knew that the statement was untrue, or they wilfully refused to make an examination, and attested the report recklessly." (Fourteenth Finding of Fact, P. 21).

The Fifteenth Finding of Fact, (P. 21), is that

"The said report was so attested by the defendants * * * * when in fact the defendants knew or *had reason to believe* that said report was incorrect and untrue, in the respects hereinabove stated."

That these Findings state clearly the precise views and grounds of the Trial Court on which the

judgment was rendered, is emphasized by the Opinion of the Trial Justice, in which he says:

“The defendants urge that though the report should be found false, there is not sufficient proof that the defendants knew it to be false, and that they cannot be held liable in an action for deceit based upon the false report, unless they attested the report, knowing it to be false. The bank had received notice from the Comptroller about March first, 1904, that \$194,000 of the items counted as assets of the bank were doubtful and must be collected or charged off. This notice was known to the defendants at the time. * * * * * This warning is, of course, not competent proof that the doubtful paper was uncollectible, but it gave to these defendants notice that they should not include all those assets in the report, at least without investigation and examination. Had they examined, as they should have done, they would have learned that the capital was impaired to its full amount. The failure to make any examination is no mere negligence, misjudgment or want of caution, nor is mere casual indifference to results or breach of duty. It amounts either to actual recklessness of results or to a wilful refusal to make the examination. * * * * * After the warning by the Comptroller and proof of the actual condition of the bank at the time of which the report speaks, the Court is bound to hold that either defendants knew the actual condition and concealed it, or made the report recklessly. It is not necessary for the plaintiff to show that these defendants actually knew the report to be false; it is sufficient to maintain the action, if he shows that the defendants attested this report not knowing whether it was true or false, and not caring what the fact might be, but recklessly paying no heed

"to the injury which might ensue," (PP. 49, 50).

Again, at Page 50, the Trial Justice, in his Opinion, adds:

"What actual facts they knew concerning the condition of the bank is not disclosed by the evidence."

And at Page 50, the Trial Justice further says:

"On the contrary, the evidence discloses that they had good reason for believing that the report was false."

B

There is no Finding, either in words or in substance, that the plaintiffs knowingly violated the statute or that they attested the report with the intention of knowingly violating the statute, or even that they knew, when they attested the report, that the report was false.

C

The Finding as to knowledge was in the alternative:

"that they either knew or had reason to believe that it was not correct; and they either knew that the statement was untrue, or they wilfully refused to make an examination, and attested the report recklessly,"

and,

"that said report was so attested by the defendants * * * when, in fact, the defendants knew or had reason to believe that said report was incorrect and untrue in the respects hereinabove stated."

These Findings are insufficient to warrant the Conclusions of Law found, for they find neither the one thing nor the other.

To state in the alternative is to state neither the one fact, nor the other.

Cronin v. Crooks, 143 N. Y., 352-354.

New Jersey Steel & Iron Co. v. Robinson, 85 A. D., 512-516. Affd. 178 N. Y., 632.

Bradley and Currier Co. v. Patcheteau, 71 A. D., 141.

The decision of the Supreme Court of the United States in the Jones National Bank case very plainly is that *where by law a responsibility is made to arise from the violation of a statute knowingly, proof of something more than negligence is required, that is, that the violation must in effect be intentional.* (Page 180).

Citing:

McDonald v. Williams, 174 U. S., 397.

Potter v. U. S., 155 U. S., 438-446.

D

The Comptroller had not declared the securities referred to in his communication worthless, nor had he directed that they be charged off, nor that they be no longer carried as assets. The Comptroller's communication was that these securities, mentioned in the list in evidence in the case, must be regarded as doubtful assts, and that immediate steps should be taken to collect them, or remove them out of the bank, (P. 42-3).

Whether the securities were objectionable, because of a kind which the law would not permit the bank to carry, or whether they were undesirable, or whether worthless, or just what the Comptroller meant in his communication, does not appear. There is no proof in the case that these

securities were "bad debts" within the meaning of the National Bank Act. "Bad debts" are defined by Section 5204 of the U. S. Rev. Stat. to be:

"All debts due to an association on which interest is past due, and unpaid for a period of six months, unless the same be secured and in process of collection, shall be considered 'bad debts.'"

There was an entire absence of proof as to how long these securities had been carried by the bank, or as to whether the interest had been paid on them, or as to whether the makers were insolvent, or whether the paper was uncollectible. The Comptroller's communication clearly gave the officials of the bank time in which to do one of two things, either to collect them, or to remove them out of the bank. This communication having been received thirty days prior to the 28th day of March, 1904, the date of the report, it certainly cannot be claimed that the plaintiffs acted in bad faith or in disregard of the Comptroller's wishes, or that they had any reason to suspect that these securities were not all good. The evidence in the case shows that \$97,000.00 of them have been collected, (P. 43).

The Comptroller's estimate of the value of these securities would not in any event be evidence as to their real worth. His estimate might be based on different grounds, some of which might not be that the securities were worthless, and yet, he would be warranted, from his standpoint, in the performance of his duty, in holding that they were worthless, and that immediate steps should be taken to collect them or to remove them out of the bank.

We therefore respectfully submit that the facts found do not warrant the judgment.

VII

Even if this judgment could be sustained as one in a common law action for deceit, there is a failure of proof of actual intentional fraud.

Kountze v. Kennedy, 147 N. Y., 124.

Much of what has been said under the preceding point is applicable here. At best, the Findings simply are that the plaintiffs *knew or had reason to believe*, and that they attested the report, either knowing it to be false, or wilfully refusing to make an examination, and attested the report recklessly. This is in the disjunctive and not the direct finding of a fact, nor is there any finding upon which a judgment could rest finding the plaintiffs guilty of intentional fraud within the purview of the National Bank Act.

The Kountze case *supra* was an action brought to recover damages for fraud and deceit alleged to have been practiced by John D. Kennedy, by which the plaintiffs claimed to have been induced to purchase bonds and stock of the Howe Machine Company from that company. The Howe Machine Company was a corporation organized under the laws of the State of Connecticut. Kennedy was the president of the company and furnished a statement of the liabilities of the company to the plaintiffs, upon the faith of which they purchased stocks and bonds of the company. Kennedy failed to put in the statement a liability of the company arising out of a claim which was in litigation, and which he and the directors and officers of the company had been informed and advised by their counsel the company was not liable to pay; and for that

reason Kennedy did not put it in the statement of liabilities which he furnished the plaintiffs. The Court held that Kennedy was not liable, inasmuch as he believed the statement he furnished to be a true statement and a true exhibit of the affairs of the company, and was guilty of no dishonesty. The Court of Appeals in its opinion in that case says that the principle stated by Croke, J., (3 Bul., 95), in respect to actions for damages for deceit :

“That fraud without damage, or damage without fraud, gives no cause of action, but when these two concur an action lies, has ever since been recognized as the principle rule governing the subject.”

The Court in its opinion further says that the *gravamen of the action is actual fraud* and nothing less will sustain it, and the representation upon which it is based must be shown not only to have been false and material, but that the defendant when he made it knew that it was false, or not knowing whether it was true or false, and not caring what the effect might be made it recklessly, paying no heed to the injury which might ensue. Mismanagement, however gross, or want of caution, however marked, is not fraud. Intentional fraud, as distinguished from a mere breach of duty or the omission to use due care, is an essential factor in an action for deceit. A man to intentionally deceive another to his injury should be held responsible for the consequences. But if through inattention, want of judgment, reliance upon information which a wise man might not credit, misapprehension of the facts or of his moral obligation to inquire, he makes a representation designed to influence the conduct of another, and upon which the other acts to his prejudice, if

the misrepresentation was honestly made believing it to be true, whatever other liability he may incur, he cannot be made liable in an action for deceit.

The vital inquiry is: What was the intent of the parties?

U. S. v. Alis, 73 Fed. Rep., 165.

U. S. vs. Booker, 80 Fed. Rep., 376.

Id., 98 Fed. Rep., 291.

U. S. vs. Britton, 107 U. S., 655.

U. S. vs. Voorhees, 9 Fed Rep., 143.

McKnight vs. U. S., 97 Fed. Rep., 208.

U. S. vs. Fish, 24 Fed Rep., 585.

U. S. vs. Youtsey, 91 Fed Rep., 864.

See also:

Lyon vs. James, 97 App. Div., 385-389.

Worthington vs. Herrman, 89 App. Div., 627.

The case of *Worthington v. Herrman*, last above cited, was an action brought to recover damages for stock purchased upon the strength of a statement made by the company. The Court in its opinion says (page 628), that the defendants when they issued the option were the executive officers of the corporation, but it is not to be presumed from that fact that they had accurate knowledge of its financial condition, or of the enormous details of its vast business, and that they should be charged with only a general knowledge of matters, not entering into and forming part of their own personal duties; that when in their negotiations with Mr. Untermeyer, they undertook to ascertain the value of the stock they were offering for sale, that they applied to the bookkeeper in the employ of the corporation and accepted as correct the statement furnished by him, an expert accountant, and this

was embodied in the option qualifying it by the "Explanatory Notes." The Court in its decision further says that this may have been erroneous and the use of it by them may have produced damage to the purchaser for which they are liable, but direct proof of an intent by the plaintiffs to deceive, or proof of facts from which such intent may have been inferred, is wholly wanting, and that they were unable to find any fact that the plaintiffs were guilty of deceit or bad faith in any part of the transaction had out of which this litigation has arisen. That the gravamen of the action (for deceit) is actual fraud, and nothing less will sustain it, and cites:

Kountze v. Kennedy, 147 N. Y., 129;
Schwenz v. Nailor, 102 id., 686.

To make a representation actionable in an action for deceit it must not only be false, but the person making it must know that it is false. If the person making the representation believed it to be true, he is not liable.

5 Abb. Enc. Dig., 32.
Kountze v. Kennedy, 147 N. Y., 124.
Weed v. Case, 55 Barb., 534.
Livingston v. Keach, 34 Super. Ct., 547,
and cases cited.

To sustain an action for deceit, not only falsity, but knowledge of falsity of representation must be shown.

Moore v. Noble, 53 Barb., 425.
Oberlander v. Spiess, 45 N. Y., 175.
Stitt v. Little, 63 N. Y., 427.
Duffany v. Ferguson, 66 N. Y., 482.
Thomas v. Snyder, 77 Hun, 365.
Barrett v. Western, 66 Barb., 205.

Fraud is not proved by showing falsity of statements, matters of opinion and belief based upon information from others, but it must appear in addition that he who made the statements knew that they were not true when he made them.

Hubbell v. Meigs, 50 N. Y., 480.

Duffany v. Ferguson, 66 N. Y., 482.

Scienter is essential.

Lamb v. Kelsey, 54 N. Y., 645.

See also:

Marsh v. Falker, 40 N. Y., 562.

Chester v. Comstock, 40 N. Y., 575.

Bennett v. Judson, 21 N. Y., 238.

Atkins v. Alwell, 45 N. Y., 760.

Livingston v. Keach, 34 Super. Ct., 547.

Livingston v. Keach, 34 Super. Ct., 547, above cited, discusses the foregoing cases and holds that it was error to refuse to charge that if the jury believed that the statements made by the defendant were made in the honest belief of such statements, and although such belief resulted from a mistake he had fallen into without fault on his part, the plaintiff cannot recover.

See also Meyer v. Amidon, 45 N. Y., 169, which holds that an action founded upon deceit and fraud cannot be maintained in the absence of proof that defendant believed, or had reason to believe, at the time when he made them, that the representations were false, or that he assumed or intended to convey the intention that he had actual knowledge of their truth, although conscious that he had no such knowledge.

When representations are made by a director

of a corporation in the form of public statements and reports as to the financial condition of the corporation, knowledge of all the affairs of the company cannot be imputed to him for the purpose of charging him with fraud.

Wakeman v. Dalley, 51 N. Y., 27.

VIII

There was no sufficient or satisfactory proof that plaintiff purchased the stock relying on the published statement.

Assuming, for the mere sake of the argument, that the common law action of deceit could be maintained, still that it must be shown in any event that defendant purchased the stock, relying on the published statement, is a proposition too plain to require argument or citation of authorities.

The testimony in the case as to this is as follows:

By Defendant—That he purchased the stock through W. R. Waterbury, his brother-in-law (P. 29); that he did not himself see the published report prior to the time the stock was purchased (P. 29, 34); that Waterbury spoke to him about purchasing the stock (P. 29, 33); that he had no other information except what he obtained through Waterbury (P. 29, 30); that Waterbury told him that he had seen and examined the last published statement (P. 30, 34), and what the report showed as to amount of capital, surplus and undivided profits (P. 31, 35), and that he thought it a good investment and would not think of parting with

his stock for the price mentioned (P. 30, 33, 35); and that he relied upon the statements Waterbury made to him (P. 29, 34, 35); and took his word as to what the published statement showed (P. 31, 34, 35), and bought the stock, *relying almost entirely upon Waterbury's judgment* (P. 34, 35), and was guided almost entirely by Waterbury's judgment (P. 35); that he believed that the last published statement of the bank did contain the statements, which Waterbury made to him, as to amount of capital stock, surplus and undivided profits (P. 31, 34, 35), and that he relied upon such statement (P. 31); that before purchasing the stock, and after he and Waterbury had had their first conversation about it, he had Waterbury look up and investigate concerning it (P. 35), and it was after Waterbury reported to him the result of his investigations that he purchased the stock, (P. 30, 35). The matter of purchase of the stock was first suggested by Waterbury (P. 28, 29, 33), and Waterbury told him how much the stock was paying in dividends (P. 33) and generally and strongly recommended to him the stock as an investment—as reference to such pages will show.

Waterbury testified to much the same effect, and also testified as to his investigations and report thereon to plaintiff (P. 41), and that he had seen the report and relied on it, and communicated to Taylor what the report showed as to amount of capital stock, surplus and undivided profits.

From the testimony it clearly appears that defendant bought the stock entirely on the advice and suggestion of Waterbury. He did not rely very much, if any, on what the last published statement showed, for he, after being told what it showed, had Waterbury investigate further—

and asked as to the future (P. 30) and did not purchase until Waterbury had investigated and then told him he thought it good stock to buy. In his investigation Waterbury went outside the report, and when he reported to defendant reported and depended upon what he had learned from his outside investigation. The proof is far from satisfactory, if at all satisfactory, that either defendant or Waterbury relied to much, if any, extent upon the published statement.

IX

The evidence as to defendant's reliance on the published statement was improper and incompetent.

The evidence is elsewhere in this brief fully stated as to this. Waterbury told the defendant in error what the statement showed as to capital stock, surplus, and undivided profits. Waterbury says that he believed the statement, and Taylor says that he believed what Waterbury told him and that the statement showed capital stock, surplus, and undivided profits as stated by Waterbury. (Defendant did not see the statement until after he had purchased the stock.) It is respectfully submitted that this class of evidence, all of which was duly objected to by the plaintiffs in error, was incompetent, improper and hearsay as to the plaintiffs in error, and immaterial, and that the judgment must be reversed on account of it, there being no other evidence on this point.

X

The Court of Appeals of the State of New York erred in affirming the decision of the Supreme Court to the effect that the notice from the Comptroller of the Currency on the 27th day of June, 1904, was an adjudication or notice that the capital of the said bank was impaired in March, 1904. The said Court also erred in affirming the decision of the Supreme Court to the effect that the letter from the Comptroller of the Currency to the bank that a certain list of notes therein mentioned were considered doubtful, and that immediate steps must be taken to collect or remove them from the bank, was evidence that such assets were in fact doubtful.

Without holding and deciding that the letter and notice from the Comptroller were evidence of the facts therein stated, it was impossible for the State Court to conclude that the published statement of the condition of the bank as attested by the plaintiffs in error was false.

In addition to what has been previously said in this brief concerning such letter and notice, we desire to add that while the notice of the Comptroller levying the assessment on the stockholders, was conclusive upon the stockholders and resulted in the payment by the defendant in error of the assessment on his stock, there is nothing in the record to show that such assessment was levied because the assets referred to by the Comptroller in his letter were in fact doubtful. The levying of the assessment occurred nearly three months after the published statement had been attested by the plaintiffs; and even though it was evidence that the

bank's capital was impaired on the date when the assessment was ordered, it was not competent evidence to show that the plaintiffs in error knew when they attested the report, that the capital stock was impaired and its surplus or any part thereof, wiped out or that the directors attested the report with the intention of *knowingly violating* the statute. The directors had a right and it was their duty to include the assets referred to in the letter of the Comptroller in the published statement for the reason that such assets were on hand, and there had been no adjudication at that time that they were doubtful, nor had they been charged off.

In *Lord v. Jenness*, 13 Howard 198, which was an action brought against certain persons for giving a commercial letter of recommendation with intention to defraud and deceive, whereby the party to whom the letter was addressed gave credit and sustained loss, it was held that the question for the jury was whether or not there was fraud and an intention to deceive in giving the letter; and that if there was no such intention, and if the parties honestly stated their own opinion, believing at the time that they stated the truth they were not liable, although the representation turned out to be entirely untrue.

To same effect see also

Penn Mutual Life Ins. Co. v. Mechanics Savings Bank and Trust Company, 73 Fed. Rep., 653, and
Brady v. Evans, 78 Fed. Rep., 558, 560.

The plaintiffs in error were authorized under the letter written by the Comptroller to retain the assets to which he called attention, and make an effort

to collect them. The evidence shows that at the time of the trial over one-half of them had actually been collected. There is nothing to show but that the other half, or a goodly portion of them, might in time be collected. And in any event, the Comptroller's judgment was not binding on the bank or the directors at that time. The only authority which the Comptroller had, if he deemed these assets so doubtful as to be worthless, and by reason thereof the capital stock and surplus to be eliminated, was to direct an assessment and in default of its being levied and collected, to put the bank into liquidation, and until this was done the Bank was authorized to carry these items and list them as assets. This he did not do until June 27th, 1904. The directors were therefore authorized to use their judgment concerning these assets and to include them in the statement. In any event, as has been previously urged herein, and as was held by Judge Woolson in *United States vs. Graves*, the entry of loans and discounts in reports to the Comptroller does not guarantee the solvency of the makers of the paper, but is a statement that in truth and in fact at the date named in the report, the bank actually held loans and discounts to the aggregate so reported.

Until the Board of Directors had declared these assets worthless, or had directed them to be charged off, they had to be included in the statement, and the plaintiffs in error had no alternative. The report was the report of the Bank, and was attested by the plaintiffs in error as required by the statute (Sec. 5211). And had the statement omitted these assets the plaintiffs in error in attesting the report would have been guilty of making a false entry in the report under Section 5209 of the R. S. and would have been

liable to the Bank and the stockholders under Sec. 5239 for the damages which would have resulted from omitting them.

Hanna vs. Lyon, 179 N. Y., 107.

The report was called for by the Comptroller and it had to be made, and it also had to be attested to comply with the statute; and because the plaintiffs in error attested a report which correctly set forth and showed the assets and liabilities of the Bank, as shown by the books of the Bank they have been held liable. Had the report failed to show these assets and liabilities they would have been liable under Sec. 5209 and 5239, for not including these assets while they were still carried on the books of the Bank and had not been declared worthless by the Board of Directors—the only authority there was for declaring them worthless.

The plaintiffs in error could not be indicted for attesting this report, because the report contained no false entry; it was true; and this being so they cannot be held liable in this action.

XI

The Court of Appeals erred in not holding and deciding that the plaintiffs in error were not liable unless they, in attesting the report, did so with intent to knowingly violate the provisions of the National Bank Act.

In the Yates case (*supra*) this Court said (at page 190) “that where by law a responsibility is made to arise from the violation of a statute

knowingly, proof of something more than negligence is required, that is, that the violation must in effect be intentional," citing *McDonald v. Williams*, 174 U. S., 397; *Potter v. United States*, 155 U. S., 438, 446.

XII

The Court of Appeals erred in affirming the decision of the Supreme Court to the effect that the plaintiffs in error either had knowledge of the falsity of the said statements, or any of them, in the said report or attested the same recklessly or without examination as to the truth thereof.

There was nothing before the court to warrant this finding. The only evidence there was as to the assets of the bank and its condition at the time the report was attested was the letter from the Comptroller to the bank prior to March 30th, 1904, calling attention to certain assets as doubtful and the subsequent notice of the Comptroller directing the levying of an assessment on the stockholders. There was nothing to show that the plaintiffs in error knew that any of the assets of the bank were worthless, or that the capital stock was impaired.

Briggs v. Spaulding, 141 U. S., 132, 161-164.

In *Cochrane and Sayre vs. United States*, 157 U. S., 286, which was a case in which the defendants were indicted for making a false entry in the report under Revised Statutes, Section 5209, this court said that under such section there is

“no penalty affixed to the association or
 “its officers for making a false report, nor
 “to the president or cashier for verifying
 “such report. The penalty imposed by
 “Section 5209 is fixed to the one who
 “makes any false entry in any book, re-
 “port or statement of the association;
 “and that penalty is applicable to any
 “officer or agent of the bank, who actual-
 “ly makes the entry, with intent to injure
 “or defraud, or to deceive any agent ap-
 “pointed to examine the affairs of any
 “such association.”

All that is required is that the report shall not contain a false entry; and if the report correctly states the assets and liabilities, the condition of the bank as shown on its books, this is all that is required. When such a report is thus made there is no liability, for Section 5239 of the Revised Statutes prescribes that

If the directors of any National Bank-
 “ing Association shall knowingly violate,
 “or knowingly permit any of the offi-
 “cers, agents or servants of the associa-
 “tion to violate any of the provisions of
 “this title” (62) “all the rights, privil-
 “eges and franchises of the association
 “shall be thereby forfeited * * * *
 “and in cases of such violation, every
 “director who participated in, or assented
 “to the same, shall be held liable in his
 “personal and individual capacity for all
 “damages which the association, its share-
 “holders, or any other person, shall have
 “sustained in consequence of such viola-
 “tion.”

The only sections of said title 62 relating to reports by National Banks and the officers and directors of National Banks, are Section 5209, which prescribes a penalty of imprisonment for making a false entry in a report, and Section 5211, which

provides for the making and attesting of such reports, and Section 5213, which provides a penalty of \$100 per day for failure to make a report. These are among the violations referred to in Section 5239, and are the only sections relating to reports.

The published report of the Citizens National Bank of Saratoga Springs which the plaintiffs in error attested, and set forth in the complaint herein, "was a true statement of the condition as shown by the books" of the bank (testimony of Charles D. Thurber, Cashier, pages 44-5 of the record). There is no evidence in the case, nor is any claim made or suggested that the books were incorrect, or that there were any false entries in the books of the bank, or that there was any false entry in the published report. It therefore follows that as the report contained no false entry or statement, and showed correctly and truly the condition of the bank as shown by the books of the bank, that there was no violation of the statute, and the judgment of the trial court and of the Court of Appeals in affirming it was error for which the judgment must be reversed.

XIII

Defendant has mistaken his forum, as this action cannot be maintained in a state Court.

Section 5239 of the Revised Statutes of the United States provides that if a director shall knowingly violate any of the provisions of Title 62 he shall be liable

"for all damages which it * * * *
 "or any other person shall have sustained
 "in consequence of such violation."

And further:

"Such violation shall, however, be deter-
 "mined and adjudged by a proper Cir-
 "cuit, District or Territorial Court of the
 "United States in a suit brought for that
 "purpose by the Comptroller of the Cur-
 "rency in his own name, before the asso-
 "ciation shall be declared dissolved."

Entirely aside from the point that an action against a bank director for a violation of Section 5239 could not be maintained until there had been a forfeiture of the charter, we maintain that an action under Section 5239 can only be brought in the Courts of the United States.

There is nothing in the language of the Court in *Yates vs. Jones National Bank*, 206 U. S., pp. 180-181, contrary to this view. Apparently, the only question discussed by the Court in the last two paragraphs of the opinion is as to the right to sue a director before a forfeiture of the bank's charter has been adjudged. Aside from this point we urge that Section 5239 does not authorize a suit against a National Bank director, nor does any other provision of Title 62, U. S. R. S., authorize such a suit except in Courts of the United States, and an examination discloses that this is the rule.

As National Banks derive their existence and organization solely from the acts of Congress, which make provision for the punishment of certain crimes committed by bank officers and agents, it would seem that the Federal Courts have exclusive jurisdiction of such offences, notwithstanding the existence of State statutes pun-

ishing these offences, for by the terms of the Judiciary Act the Courts of the United States are vested with exclusive cognizance of all crimes that are made punishable by acts of Congress, except when the act of Congress makes other provisions.

In re Eno, 54 Fed. Rep., 669.
 State vs. Fuller, 34 Conn., 280.
 Com. vs. Felton, 101 Mass., 204.
 People vs. Fonda, 62 Mich., 401.
 Com. vs. Ketner, 92 Pa. St., 372.

The Federal Courts have exclusive cognizance of the offence of embezzlement of the funds, etc., of a National Bank, and the offence is punishable only under United States Statutes.

U. S. vs. Buskey, 38 Fed. Rep., 99.
 State vs. Tuller, 34 Conn., 280.
 Com. vs. Felton, 101 Mass., 204.
 Com. vs. Ketner, 92 Pa. St., 372.
 People vs. Fonda, 62 Mich., 401.

State Courts have jurisdiction of offences by National Bank officers for which the acts of Congress have not made provision.

State vs. Tuller, *supra*.
 State vs. Fields, 98 Ia., 748.
 State vs. Bardwell, 72 Miss., 535.

As directors are punishable under the United States Law for a violation of the provisions of Title 62, and as the National Bank Act contains within itself the rights, remedies, and penalties for any transgression of those provisions, we submit that the United States Courts alone would have jurisdiction of an action of this character.

XIV

The motion should be denied for the reason that it ignores entirely all of the errors assigned by the plaintiffs in error, except those which claim that a common law action for deceit will not lie, and that the Court of Appeals erred in deciding the action as one at common law for fraud and deceit.

Respectfully submitted,

NASH ROCKWOOD,

Of Counsel for Plaintiffs in Error.

Saratoga Springs, N. Y., April 11, 1910.



23
No. 171.

Supreme Court of the United States

OCTOBER TERM, 1911.

~~1911-1912~~

United States Court, U. S.
FILED.

JAN 3 1912

CASSIUS B. THOMAS, WILLIAM D.
AND EDGAR D. STARBUCK,

JAMES H. McKENNEY,
CLERK.
EDDY

Plaintiffs in Error,

vs.

WILLIAM C. TAYLOR,

Defendant in Error.

BRIEF OF THE PLAINTIFFS IN ERROR

NASH ROCKWOOD,

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Saratoga Springs, N. Y.

L. B. McKELVEY,

on the Brief.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1909.

No. 702

CASSIUS B. THOMAS, WIL-
LIAM D. EDDY and EDGAR
D. STARBUCK,

Plaintiffs in Error,

— vs. —

WILLIAM C. TAYLOR,
Defendant in Error.

BRIEF OF THE PLAINTIFFS IN ERROR.

The case comes to this court by writ of error allowed by the late Justice Harlan on the 2nd day of December, 1909, and issued to the Supreme Court of the State of New York (p. 69). The facts are simple, and the proceedings which have led to review in this court may be very briefly stated.

In December, 1904, the defendant in error instituted an action in the Supreme Court of the State of New York against the plaintiffs in error, to recover the sum of \$4800, with interest, as damages resulting from an alleged fraud and deceit. The material allegations of the complaint are to the effect that the then defendants were directors

of the Citizens National Bank of Saratoga Springs, N. Y., a corporation organized under the Banking Laws of the United States, and subject to the laws of the United States with respect to the regulation of its business; that on the 6th day of April, 1904, in pursuance to a call of the Comptroller of the Currency, the cashier of said bank made and verified a statement of its condition, and that these three directors thereafter attested the correctness of said report. It is further charged that the report was then published, as required by the National Banking Act, and that in the month of June of the same year, the plaintiff, relying upon the truth of said report thus attested, purchased thirty shares of the stock of said institution, and paid therefor the sum of \$160 per share, amounting in all to \$4800. It is further charged that had the report been true the stock would have been worth the price paid, but that it subsequently developed that the published statement was false in material respects, and to such an extent that the entire investment failed, and the plaintiff was required, by virtue of an order of the Comptroller of the Currency, to pay an assessment of 100 per cent upon the stock so purchased. The complaint then proceeds with the usual allegations that the defendants knew the report to be false when they attested it, that they did so with the intention of deceiving the public, and among others the plaintiff, who was deceived thereby and suffered loss in the sum of \$4800, for which judgment is demanded (pp. 2-4).

The answer of the then defendants admits the attesting of the report, its publication, the subsequent assessment upon the stockholders, and some

of the other allegations of the complaint; it denies, however, that the report was false, or was known so to be, denies any intent to deceive, and further denies that the then plaintiff relied upon said representation, or suffered any damage by reason thereof. It is further alleged by way of separate answer and defense, that there was a defect of parties defendant, in that the Cashier of the bank, who made and verified the report, was not joined as a party (pp. 4-6).

The issues thus raised were brought to trial before Hon. Charles C. Van Kirk, one of the Justices of the Supreme Court of the State of New York, at a trial term held, by consent of the parties, in Saratoga Springs, on March 25th, 1907. Trial by jury was waived. At the close of the trial the learned court rendered a decision and judgment in favor of the then plaintiff and against the defendants for the amount demanded in the complaint (p. 21). The opinion of the Trial Justice is to be found at page 47 of the record.

The then defendants appealed from this judgment to the Appellate Division of the New York Supreme Court, Third Department, and there the judgment was affirmed, being reduced, however, by the sum of \$2600 and interest (p. 54). The opinion of that court was written by Mr. Justice Cochrane (p. 56). Again the defendants appealed, and the case was reviewed in the Court of Appeals of New York State, and this resulted in an affirmance of the decision of the Appellate Division, the Court of Appeals writing no opinion, but adopting that of the Appellate Division (p. 59).

The defendants then petitioned this court for a writ of error, which was allowed by Mr. Justice Harlan on the 2nd day of December, 1909, (p. 70). The assignments of error are set forth in the record at page 63 et seq., and will be discussed in detail in the subsequent pages of this brief.

A motion to dismiss the writ of error, and to affirm the judgment was presented to this court early in the year 1910 by the defendant in error, but was denied.

The attention of the court is now invited to the facts upon which the judgment under review is based, and to those proceedings in the case which are relevant to the discussion here.

When the case came to trial in the Supreme Court of the State of New York, and had been opened by the attorney for the then plaintiff, counsel for the defendants moved to dismiss the complaint upon several grounds, among others:

“ First. The action is brought as a common
 “ law action for deceit against three men con-
 “ ceded by the complaint to have been, at the
 “ time of the commissions of the wrongs al-
 “ leged, directors of a national bank, oper-
 “ ating and conducting the same under the
 “ National Banking System at Saratoga
 “ Springs, N. Y., and under the United States
 “ laws relating thereto; that sections 5207 and
 “ 5239 of the Revised Statutes of the United
 “ States are sections relating to the operation
 “ and management of national banks, and
 “ the liability of directors and officers con-
 “ nected therewith and provide within them-
 “ selves an exclusive remedy for all violations

" of the provisions of the statute; the state-
 " ment of counsel just made is that the di-
 " rectors are liable under the statute; while
 " that may be so, it does not make them liable
 " at common law in an action for deceit; that
 " the National Banking Law provides an ex-
 " clusive remedy for a violation of any of its
 " provisions; there is no allegation in the com-
 " plaint in this action that the defendants
 " made or suffered to be made a false entry in
 " any of the books of the bank; that the mak-
 " ing of a false report as such—conceding the
 " report to be false, (which the defendant
 " does not concede as a fact)—is not a viola-
 " tion of the National Banking Statute; that
 " there must be the allegation of a false entry,
 " either actively by the directors charged, or
 " by some one, with their knowledge, connived
 " at by them. (p. 27).

The record then discloses a colloquy between
 court and counsel which was concluded in this
 manner, (p. 28).

" Judge Rockwood: The National Bank-
 " ing Act contains within itself an exclusive
 " remedy for violations of the act, and de-
 " fines the liability of directors and officers
 " of national banks; and any cause of action
 " or remedy sought to be enforced against a
 " director or officer by a stockholder must be
 " enforced in accordance with the provisions
 " of the National Banking Law, and the com-
 " mon law action for deceit cannot be main-
 " tained under the circumstances set forth in
 " this complaint.

" Judge Van Kirk: That no liability on ac-
 " count of the acts of a director or officer of a
 " national bank exists except such liability as
 " is stated in the statute?

" Judge Rockwood: In the National Bank-
 " ing Law.

“ Senator Brackett: The plaintiff brings
 “ the action for deceit precisely in the form,
 “ and on the ground, that he would have
 “ brought it, or might have brought it, if they
 “ had issued a prospectus that was false, and
 “ that was not at all required by the National
 “ Banking Law.

“ Judge Van Kirk: The defendant claims,
 “ and the plaintiff concedes, that this is not
 “ an action to recover upon any liability
 “ stated in the National Banking Act against
 “ a director or officer of a national bank.

This motion is thus quoted at length so that this court may be advised at the very outset that the plaintiff in the State court disclaimed any intent of enforcing any of the liabilities created by the provisions of the National Banking Act, and expressly declared his action to be a common law action for fraud and deceit, and nothing more. This will be of paramount importance throughout the entire discussion.

The motion having been denied, the plaintiff proceeded with his case, and the testimony may be briefly summarized thus:

William C. Taylor, the plaintiff, testified that in May, 1904, he had a conversation with his brother-in-law, William R. Waterbury, relating to the purchase of Citizens Bank stock; that he subsequently purchased 30 shares through Mr. Waterbury; that he did not see the published report of the condition of the bank in March, 1904, and had not seen such report prior to the time that he made his purchase. He relied upon the statements made to him by Mr. Waterbury, and had no other information upon the subject (pp. 28-29). Waterbury stated to the plaintiff that he had examined the

statement of the bank which had been last previously published, (page 30).

A letter written by the plaintiff to Waterbury, and Waterbury's reply to the same, were then offered and received in evidence, which read in full as follows:

“ Dear Will: Find out for me please how
 “ many shares of that bank stock there is for
 “ sale at 160; and also tell me what you think
 “ the prospects are for future.

“ I was in such haste this P. M. I could
 “ hardly treat you decently. Forgive me,
 “ please.

“ Your Bro.,
 “ W. C. TAYLOR.

“ Dear Will: The quantity is twenty shares
 “ with a possibility of thirty. After June 15
 “ if not sold, the owner will hold until the
 “ July dividend is paid, then offer for sale
 “ again. I think it a good investment and
 “ would not think of parting with my stock
 “ for the price named.

“ Yours,
 “ WILL.”

Plaintiff further testified that Waterbury stated to him what the report showed, in substance, that the bank had a capital of \$100,000, surplus of \$50,000, and undivided profits of about \$13,000; that he believed the statement thus made by Waterbury, and relied upon the same, and subsequently instructed Waterbury by letter to purchase 30 shares of the stock, if for sale, enclosing certified checks for payment. This letter, plaintiff's Exhibit 2, (p. 31) reads as follows:

“ Ilion, May 31, 1904.
 “ Dear Will: I enclose certified checks for
 “ payment of Cit. Bank Stock, \$3,200.00 and
 “ \$1,600.00.
 “ You may purchase the 30 shares, if for
 “ sale—I have drawn checks so as to make
 “ it right either way—(20 or 30 shares).
 “ Please keep the certificates in your safe
 “ until I come to Sar. some time.
 “ Thanks for your kindness and trouble.
 “ Your Bro.,
 “ W. C. TAYLOR.

Plaintiff later received the stock from Mr. Waterbury, and came to Saratoga on June 27th, and there had a conversation with two of the defendants, Starbuck and Eddy, in which they expressed sympathy for him in his loss. He later had a conversation with Thomas, in which that defendant stated that had Mr. Waterbury asked his advice before purchasing, he would have advised against the purchase (p. 32).

Under date of June 28th, 1904, the plaintiff received a letter, plaintiff's Exhibit 3 (p. 33), which reads in full as follows:

“ June 28, 1904.
 “ W. C. Taylor, Esq., Ilion, N. Y.
 “ Dear Sir: You are requested to call at
 “ the bank and confer with Mr. C. B. Thomas,
 “ concerning the payment by the stockholders
 “ of this bank of a voluntary subscription of
 “ \$100 per share.
 “ At a meeting of the directors and many
 “ of the stockholders recently held, it was
 “ thought advisable to make this request for
 “ a voluntary subscription in order to
 “ strengthen the bank, the details of which
 “ you have probably read in the public press.

“ Payments have already been made by the
 “ stockholders covering two-thirds of the
 “ stock of this bank, and we should be glad
 “ to have you call so that the whole matter
 “ may be explained to you and your payment
 “ arranged for.

“ Yours very truly,
 “ (Sd.) C. B. THOMAS.

The following admission was made by the parties at page 33 of the record.

“ It is admitted that on the 30th day of
 “ June, 1904, an assessment of \$100 per share
 “ had been ordered by the stockholders on
 “ the direction of the Comptroller, which was
 “ subsequently paid, and the plaintiff paid
 “ his assessment prior to the commencement
 “ of this action; and that the proceedings to
 “ make that a binding assessment were duly
 “ taken. And that notice from the Comptrol-
 “ ler of the Currency to the bank that its cap-
 “ ital stock had become impaired by the
 “ amount of \$100,000, and that under the pro-
 “ visions of section 5205 of the United States
 “ Revised Statutes such deficiency in the cap-
 “ ital stock had to be made good by assess-
 “ ment upon the stockholders pro rata to the
 “ amount of the capital stock held by each, or
 “ the bank would be placed in liquidation, was
 “ received by the bank June 27, 1904.

Upon cross-examination the plaintiff admitted that in May, 1904, he had had a conversation with his brother-in-law, in which that person stated that he had a chance to buy 30 shares of Citizens Bank stock for 160, and that he considered it a good investment; that it was paying 4% and 5% semi-annually as interest, and that he had a lot of the stock himself, and thought it was worth 175, and that he thought it was a good thing to buy.

Waterbury did not then state where he could purchase, or who the stock could be bought from, nor did he say by whom it had been offered. Waterbury was a director of the First National Bank of the same village in which the Citizens Bank is located (p. 33).

Up to this time the plaintiff had not spoken to Waterbury about the stock. He believed what Waterbury said to him, and believed his statements to be true. He had always found his brother-in-law to be truthful, and he relied upon the statements made. He had many times conferred with this brother-in-law about business matters, and admitted that he might have made other investments upon Mr. Waterbury's judgment (p. 34). He was then asked this question, and made this reply:

“ Q. Did you make this on his judgment? A.
“ Almost entirely. (p. 34).

Prior to the purchase of the stock plaintiff had never had a conference of any kind with either of the defendants, and never talked with any of these gentlemen until the 27th of June (p. 34). He could not be positive that he had seen the published statement of the bank prior to the purchase of the stock, and after some evasion finally admitted the fact in these words:

“ Q. Was it before you had purchased this
“ stock or after? A. After.
“ Q. You saw no published bank statement
“ until after you had purchased the stock?
“ A. No, sir. (p. 34).

Plaintiff testified that Waterbury mentioned having seen the bank statement, and its contents; and that Waterbury told him that he had investigated and advised with several people, and could give the result of his investigation. Plaintiff was guided almost entirely by Waterbury's judgment, and did not ascertain or know anything about the loans or discounts of the bank. The only knowledge that plaintiff had, at the time he commenced the action, of the condition of the bank, or of the alleged falsity of the report, came from the assessment of 100%, and from no other source (p. 35). After making this statement, however, he testified that he had heard things from different people (p. 36).

The foregoing is substantially the testimony given by the plaintiff.

William R. Waterbury, called by the plaintiff, stated that he resided at Saratoga Springs, and had for fifty years; had been a stockholder in the Citizens National Bank, but had sold his stock to Thomas in 1905. In August, 1904, he became a director of the First National Bank, a rival of the Citizens. In May, 1904, the witness' attention was called to the fact that 20 or 30 shares of Citizens Bank stock could be purchased; he was so informed by one D. C. Brownell, who stated that if the stock were sold before June 15th it could be purchased for 160 (pp. 36-37). Waterbury then talked with the plaintiff about the stock at plaintiff's home at Ilion, N. Y., on May 24th, stating to the plaintiff that he could buy a block of Citizens Bank stock that was for sale, either 20

or 30 shares; that it could be bought for 165, and that the last statement of the bank showed a capital of \$100,000, a surplus of \$50,000, and undivided profits of between \$13,000 and \$14,000; that the Citizens Bank was paying dividends of 5% and 4% semi-annually, and that this would give a book value of 163 or 164. He further stated that he himself would not take 175 for the stock which he then owned (p. 37). Mr. Taylor then stated that he would think about the matter.

Prior to this time Waterbury had seen the report published on the 8th day of April, 1904, concerning the condition of the bank at the close of business on March 28th, 1904, and stated that he believed it to be true. The report was then offered in evidence at page 38, and reads in full as follows:

“Report of the Condition of the Citizens National
Bank, at Saratoga Springs, in the State of
New York, at the Close of Business
March 28, 1904:

RESOURCES.

Loans and discounts.....	\$633,166.38
Overdrafts, secured and unsecured..	2,665.77
U. S. Bonds to secure circulation...	100,000.00
U. S. Bonds to secure U. S. deposits.	160,000.00
Premiums on U. S. Bonds.....	20,800.00
Stocks, securities, etc.....	225,342.47
Banking house, furniture and fixtures	33,000.00
Other real estate owned.....	34,906.72
Due from National Banks (not reserve agents)	1,114.84
Due from state banks and bankers..	8,643.46
Due from approved reserve agents..	76,120.17
Revenue stamps	308.89
Checks and other cash items.....	244.50
Exchanges for clearing house.....	1,495.52
Notes of other National Banks.....	8,370.00
Fractional paper currency, nickels and cents	1,763.82

Lawful money reserve in Bank, viz:

Specie \$29,780.10

Legal tender notes . . . 33,492.00

63,272.10

Redemption fund with U. S. Treasurer (5 per cent of circulation) . . .

5,000.00

Total \$1,376,174.64

LIABILITIES.

Capital stock paid in \$100,000.00

Surplus fund 50,000.00

Undivided profits, less expenses and taxes paid 13,456.75

National Bank notes outstanding . . . 95,800.00

Due to other National Banks 31,418.68

Due to state banks and bankers 613.55

Due to Trust Companies and savings banks 2,814.10

Dividends unpaid 25.00

Individual deposits subject to check \$225,788.15

Demand certificates of deposit 686,256.18

Cashier's checks outstanding 2.23

United States deposits . . 160,000.00

1,072,046.56

Notes and bills re-discounted 10,000.00

Total \$1,376,174.64

STATE OF NEW YORK,)
County of Saratoga.) ss:

I, J. H. DeRidder, Cashier of the above named bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

J. H. DeRIDDER,
Cashier.

Subscribed and sworn to before
me this 6th day of April, 1904.

W. H. WATERBURY,
Notary Public.

Correct—attest:

C. B. THOMAS,

E. D. STARBUCK,

W. D. EDDY,

Directors."

The witness stated that at the time he advised Taylor to purchase the stock, and when he did in fact make the purchase for Taylor, and paid the purchase price, he believed the report to be true (pp. 39, 40).

BRAID HERE

Mr. Waterbury admitted on cross-examination that he had been a stockholder of this institution for twelve or thirteen years; had received his dividends regularly, and had never heard the standing of the bank called in question up to that time. He further stated that the defendants, Starbuck and Eddy, directors of that bank, were then, and are now, three of the most reliable and prominent business men of the town; that he so considered them, (p. 41), and that he was himself associated in business with Thomas, the President of the bank, and the third defendant. He did not confer with Mr. Thomas about the stock, but did talk with DeRidder, the cashier, and with Waterbury, the teller. He at no time talked with Starbuck or Eddy, or with the other directors (p. 41), although Starbuck's place of business was within 200 feet of his. Mr. Hewitt, another director, was immediately across the street, and defendant Eddy's place of business was just around the corner, and was passed by him every day, (p. 42). This suit was instituted at the suggestion of Waterbury.

The following concession was entered upon the record at page 42 :

"It is conceded by the defendants that between the 28th day of March, 1904, and the 30th day of June, 1904, there were no losses of consequence suffered by the bank. That at least thirty days

prior to the 28th day of March, 1904, the Comptroller of the Currency had called the attention of the directors of the bank, by letter, to the situation of the bank, and that items (marked in the record 'which I hold in my hand'—Senator Brackett's hand) amounting to \$194,107.02, must be regarded as doubtful assets and that immediate steps should be taken to collect them or remove them out of the bank; and that defendants had knowledge of such letter from the Comptroller of the Currency at the time that they attested the report. That of the \$194,107.02, above referred to, \$97,000 never has been realized.

The following is the statement which Senator Brackett referred to above:

	Amounts to which Comptroller called attention prior to March 28, 1904.	Amounts collected.
Charles M. Davison...	\$4,265.80	Nothing
Reynolds Estate	1,115.87	Nothing
Estelle G. Reynolds...	603.85	Nothing
Pope note	153.00	Nothing
George H. Ames	2,000.00	Nothing
Premiums on U. S. Bonds	9,000.00	Nothing
Stocks, Securities, Claims, etc.	38,438.03	\$2,765.39
Banking house, over draft in fire fund ac- count	37,000.00	15,000.00

		(Now carried on books at this amount)
"Other Real Estate" ..	5,000.00	Nothing
J. H. DeRidder	19,725.00	\$4,231.87
Belle DeR. Ames	12,663.25	11,060.50
O. V. Howland	10,224.87	10,224.87
E. G. Rawson and Alice G. Rawson	25,157.35	25,157.35
W. H. Rowe, Jr.	7,000.00	7,000.00
W. H. Rowe & Son	5,000.00	5,000.00
W. H. Rowe Knitting Co.	6,760.00	6,760.00
Wayside Knitting Co. .	10,000.00	10,000.00
	<hr/>	
	\$194,107.02	\$97,199.98
	96,199.98	
	<hr/>	
	\$96,907.04	

The plaintiff then rested; and defendants counsel moved for a non-suit and dismissal of the complaint upon various grounds; among others,, that the provisions of the Revised Statutes of the United States provided an exclusive remedy for a violation by a National Bank director of his duty, and that no common-law action for deceit could be maintained; that there was no proof of actual intentional fraud on the part of the defendants, and no proof that the defendants had made any false entry in any report of the bank's condition, and that the making of a false report was not of itself a violation of the National Banking Act. Further that there was no evidence showing that the bank's statement as issued was not a correct and true transcript or copy of the books of the bank, and that the evidence affirmatively showed that the plaintiff had not relied upon the bank's statement but upon the judgment of his brother-in-law, and upon other sources. This

motion was denied, (pp. 43-44), and the defendants contented themselves with some formal testimony given by the cashier of the bank who had compared the statement with the books of the bank, and who testified that the statement published was a true statement of the condition of the bank as shown by the books.

The defendants then rested, and their counsel renewed the motion on all the grounds theretofore urged. This motion was subsequently denied, (p. 45).

Thereafter the Trial Justice made his decision in the form of findings of fact and conclusions of law which are set forth in full at page 19 et seq of the record. And the opinion of the trial court is shown at page 47 of the record.

It will be seen from the record of the trial, from the finding made by the trial court, and from the express terms of its opinion, that the judgment rendered was based upon a common-law action for fraud and deceit; and that the defendants at the trial court had relied entirely upon the correctness of their position that such an action could not be maintained. When the case went to the Appellate Division, however, the judgment was there modified and affirmed upon the theory that the pleadings and proofs were sufficient to support an action under the Federal Statutes although that court conceded that the Trial Justice was wrong in holding that the common-law action for fraud and deceit could be maintained. In the Court of Appeals the opinion

of the Appellate Division was adopted as the opinion of that court.

The main propositions to be urged in this court, and upon which the plaintiffs in error rely for the reversal of the judgment, will now be discussed under separate points. The errors asserted and intended to be urged are specified at pages 63-65 of the record, and are as follows:

ASSIGNMENT OF ERRORS.

(1). In holding and deciding that, upon the matters and things in the complaint in the said cause set forth, an action as at common-law for deceit could be maintained against the petitioners, defendants to the said complaint, and in the said cause.

(2). In not holding and deciding that the only liability, if any, of the said petitioners to the complaint in the said cause was upon and under the National Banking Act or Law of the United States, and especially Section 5239 of the Revised Statutes of the said United States.

(3). In holding and deciding that the said complaint sets forth an action as at common-law for deceit.

(4). In holding and deciding that the supposed cause of action set forth in and by the said complaint is not governed and limited by the liability, if any, imposed upon the petitioners by the National Banking Act or Law aforesaid.

(5). In not holding and deciding that the petitioners were not liable to said complainant unless they, the petitioners, in attesting the certain report in the said complaint mentioned, did so with know-

ledge of its falsity in all or any of the particulars in the said complaint enumerated, and with the intent to deceive, and to violate the provisions of the National Banking Act or law aforesaid.

(6). In holding and deciding that the petitioners either had knowledge of the falsity of the said statements, or any of them, in the said report, or attested the same recklessly or without examination as to the truth thereof.

(7). In holding and deciding that the certain notice from the Comptroller of the Currency of the United States to the certain bank in the said complaint mentioned, of, to-wit: the 27th day of June, 1904, was an adjudication or notice that the capital of the said bank was impaired, or was evidence of such impairment.

(8). In holding and deciding that the certain notice or information from the Comptroller of the Currency of the United States to the certain bank in the said complaint mentioned, of, to-wit: the first day of March, 1904, was evidence that the certain assets in the said notice or information referred to as doubtful were, in fact, doubtful.

(9). In holding and deciding as matter of fact that the said report so alleged to have been attested by the petitioners was untrue in the particulars in the said complaint enumerated, or in any of them.

(10). In holding and deciding as matter of fact that there was no evidence showing, or tending to show, that the said report so alleged to have been attested by the petitioners was true in the particulars in the said complaint enumerated.

(11). In holding and deciding that the said report so attested by the petitioners was attested by them with the intention of causing the public, or

any member thereof, to believe that the said bank in the said complaint mentioned was in the financial condition appearing from the said report, or to invite the public, or any member thereof, to deal with the said bank or in its stock on the assumption that such condition in fact existed; the fact being that the said report was made by the cashier of the said bank and attested by the petitioners, as directors thereof, in response to a call of the Comptroller of the Currency of the United States, and in obedience to, and compliance with, the laws of the United States in that behalf.

(12). In holding and deciding that, in buying the stock of the said bank aforesaid, the complainant, respondent in the said Court of Appeals, relied upon the report aforesaid and the statements therein contained as emanating from the petitioners.

(13). In holding or deciding that there was sufficient, or any, legal evidence showing, or tending to show, that the statement of the condition of the said bank aforesaid, as made in the report aforesaid, was in fact not true in the particulars in said complaint enumerated, or any of them.

(14). In not holding and deciding that there was an entire absence of any evidence showing, or tending to show, fraud or deceit, or attempt at either, on the part of the petitioners in attesting the said report aforesaid.

(15). In not holding and deciding that the petitioners were not liable to the said complainant, respondent as aforesaid, by reason of the attestation of the said report aforesaid, made in pursuance of a call by the Comptroller of the Currency of the United States, and intended to show, and in fact showing, the condition of the bank aforesaid

at the close of business on the 28th day of March, 1904, according to the books, accounts and records of the said bank.

(16). In not deciding and determining the questions involved in the said action in accordance only with the provisions, true intent and meaning of the National Banking Act or Law of the United States aforesaid, and in deciding and determining the said questions in assumed accordance with the principles of the common-law, and in erroneously deciding the same in accordance with such principles.

(17). In not reversing the judgment of the said Supreme Court of the State of New York and the Appellate Division thereof, and in affirming the same.

POINTS

I

The remedy prescribed by the statute is exclusive; no common law action for deceit will lie.

Three directors of a national bank attested a report to the Comptroller of the Currency. This report is now said to have been untrue; and a person who claims to have invested in the stock of the bank in reliance upon the published statement of its condition, has instituted in the courts of the State of New York an action at common-law to recover damages for deceit. Such, in a word, is the case at bar.

It is conceded that the report in question was

attested and published in obedience to a call of the Comptroller of Currency and the mandatory provisions of Section 5211 of the Revised Statutes of the United States; and as this statute thus forms the very basis of the entire controversy, I quote it fully, for the convenience of the court, as well as for the sake of intelligent and logical argument. Section 5211 reads as follows:

**"REPORTS TO COMPTROLLER OF THE
"CURRENCY.**

"Every association shall make to the
"Comptroller of the Currency not less than
"five reports during each year, according to
"the form which may be prescribed by him,
"verified by the oath or affirmation of the
"president or cashier of such association, *and*
"*attested by the signature of at least three of*
"*the directors.* Each such report shall ex-
"hibit, in detail and under appropriate heads,
"the resources and liabilities of the associa-
"tion at the close of business on any past day
"by him specified; and shall be transmitted
"to the Comptroller within five days after
"the receipt of a request or requisition there-
"for from him, and in the same form in which
"it is made to the Comptroller shall be pub-
"lished in a newspaper published in the place
"where such association is established, or if
"there is no newspaper in the place, then in
"the one published nearest thereto in the
"same county, at the expense of the associa-
"tion; and such proof of publication shall be
"furnished as may be required by the Comp-
"troller. The Comptroller shall also have
"power to call for special reports from any
"particular association whenever in his judg-
"ment the same are necessary in order to a
"full and complete knowledge of its condi-
"tion."

And in this connection I invite the attention of

the court at this point to Section 5239, which prescribes the penalty to be imposed for a violation of the duties created by the foregoing provisions, and declares the method by which it shall be enforced. This provision reads:

"Sec. 5239. Penalty for violation of this Title.

"If the directors of any national banking association shall *knowingly violate*, or *knowingly permit* any of the officers, agents or servants of the association to violate any of the provisions of this Title, all the rights, privileges and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district, or territorial court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of *such* violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders or any other person, shall have sustained in consequence of such violation."

We have thus before us a penal statute, prescribing a duty, creating a liability, imposing a penalty, and providing a method for its enforcement; and this duty so prescribed is entirely new, this liability so created had not theretofore existed, and this penalty had never been imposed, until the statute changed and entirely abrogated the common-law relating to the subject. All this, it seems, is very clear.

It is one of the first canons of statutory construc-

tion that where a statute imposes a penalty for a newly created offense, or for the breach of a newly prescribed duty, and defines the particular mode in which the penalty shall be enforced, it must be strictly construed; and the statutory penalty and the statutory remedy are to be deemed, in every sense and for all purposes, exclusive. This is an old familiar rule. And because, in the case at bar, the Revised Statutes have imposed upon directors of a national bank duties theretofore unknown and have created liabilities never before recognized; because a specific method of enforcing the performance of those duties and of punishing their violation is expressly prescribed in the statute creating them, it is the contention of the plaintiffs in error that the statutory liability and the statutory penalty are exclusive; that no other right can be predicated upon a violation of the statute, and no other remedy invoked, than that which the act expressly and in terms prescribes. And if this reasoning be sound, then it must necessarily follow that no common-law action for deceit can be maintained under the circumstances of this case, in which every right invoked by the defendant in error arises from, and depends for its very existence upon, an alleged violation of the statute law to which reference has been made.

If this were some new proposition, now asserted for the first time, and not heretofore decided, it might provide a fertile field for the citation of authority and the discussion of principle, which would perhaps be interesting and useful. But the precise question, in its relation to this statute, has been squarely presented to this court in a recent

case, and there authoritatively and for all time settled by a decision which is now, and must henceforth continue to be, the law of the land.

Yates vs. Jones National Bank, 206 U. S.
158.

Unless I have wrongly construed the Yates case, it is now settled, by precise and definite authority, that a common-law action for deceit cannot be maintained in such case as this; that the statutory penalty and the statutory remedy are exclusive, to all intents and purposes. And the plaintiffs in error feel justified in resting this first contention upon the case cited and the principles therein applied by Mr. Justice White. The language of the learned jurist is so precisely in point, and of such pertinent significance upon almost every phase of the present controversy, that it is quite difficult to refrain from quoting, very briefly, from the opinion. At page 176 (Yates vs. Jones National Bank, 206 U. S.), the discussion reads:

"It thus becomes obvious that the National Bank Act imposes upon directors duties which would not rest upon them at common law, and that among such duties is the furnishing to the Comptroller of the Currency reports concerning the condition of the bank, and the publication thereof."

And further on, at page 177, thus,

"Considering the text of the National Bank Act, as now embodied in the Revised Statutes, including Section 5239, we think the latter section affords the exclusive rule by

“ which to measure the right to recover damages from directors, based upon a loss alleged to have resulted solely from the violation by such directors of a duty expressly imposed upon them by a provision of the Act.

“ * * * And the last sentence ordains the rule by which civil liability is to be determined, by providing that every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person shall have sustained in consequence of such violation. As the section thus comprehends all the express commands to do or not to do, as to directors, contained in the National Bank Act, and besides specifies the nature of the conduct of directors from which their civil liability for violation of such commands may arise, it results that liability cannot be entailed upon them by exacting a different and higher standard of conduct as regards such commands than that established by the statute without depriving directors of an immunity conferred upon them.”

And by way of conclusion at page 179:

“ The civil liability of national bank directors, then, in respect to the making and publishing of the official reports of the condition of the bank, a duty solely enjoined by the statute, being governed by the National Bank Act, it is self-evident that the rule expressed by the statute is exclusive, because of the elementary principle that where a statute creates a duty and prescribes a penalty for non-performance, the rule prescribed in the statute is the exclusive test of liability. *Farmers' & N. Bank vs. Deering*, 91 U. S., 29, 35, and cases cited. The error in the decision below becomes at once apparent

“when its correctness is tested by the rule
 “that the statute is applicable and prescribes
 “the exclusive test of liability.”

This language, it would seem, is far too clear and precise to admit of doubt or cavil as to its meaning and effect; it means exactly what it says, and its plain effect is to settle for all time an important question of law and procedure. And if the Yates case does decide what is here claimed for it, and if it is to prevail as the law upon the subject, then it must be that the judgment appealed from in the case at bar, shall be reversed; *for it was recovered in a common-law action for deceit, in which absolutely nothing was predicated upon the Federal statute. It is not the statutory penalty, nor enforced in the statutory method.* This will be easily demonstrated when the pleadings, proofs and proceedings, as well as the remarkable history of this case, are fully developed, as they will be, in the subsequent pages of the brief.

II

The judgment of the State Court, awarded in a common law action for deceit, cannot be sustained here as a recovery under the Federal Statute.

It being established by controlling authority that the remedy provided by the Federal statute is exclusive, and that no action at common law can be maintained to recover damages for the violation of Section 5211 of the Revised Statutes, it re-

mains to be considered whether, upon the pleadings and proceedings in this case, the judgment recovered against plaintiffs in error can be sustained as an award based upon the statute, although the action was not commenced with any such thought in mind, and although at the trial the then plaintiff expressly disclaimed any such theory. This question it is proposed to discuss at some length, for it is of supreme importance to the issue now presented.

The action was brought to recover damages at common law for fraud and deceit, and the allegations of the complaint are in the form peculiar to such an action, setting forth, in their logical order, a representation, falsity, scienter, deception and resulting damage (pp. 2-3). Of this pleading the Trial Court said in its opinion, at page 48,

**“ In the complaint the plaintiff has set forth
“ a cause of action for deceit and not a cause
“ of action under the statute.**

And this was precisely the construction which the defendant in error claimed for his pleading at the trial, and the theory to which all his proof was directed and upon which he recovered. *Time after time, and in the most direct, solemn and positive terms, his counsel characterized the action as a common-law case of fraud and deceit, so recording himself upon the minutes, and disclaiming in precise and definite terms, any intention of seeking a recovery for violation of the statute. A mere glance at the record will suffice to demonstrate all this.*

At page 28 of the record it will be seen that counsel for the then defendants moved at the very commencement of the trial for the dismissal of the complaint, stating among other grounds as follows:

" Judge Rockwood: The National Banking Act contains within itself an exclusive remedy for violations of the act, and defines the liability of directors and officers of national banks; and any cause of action or remedy sought to be enforced against a director or officer by a stockholder must be enforced in accordance with the provisions of the National Banking Law, and the common-law action for deceit cannot be maintained under the circumstances set forth in this complaint."

After discussion between Court and counsel, it was stated by the learned trial justice, and concurred in by counsel, that the action was brought at common law and not under the statute, and this concession was recorded in the minutes, at page 28, in these precise terms:

**" Judge Van Kirk: The defendant claims, and the plaintiff concedes, that this is not an action to recover upon any liability stated in the National Banking Act against a director or officer of a national bank.
" Decision upon the motion was reserved, and the same was subsequently denied with an exception to the defendants."**

The trial then proceeded upon this theory, the then plaintiff seeking to establish the essential elements of an action for deceit, and so conducting his case; and at the close of the evidence the Trial Court expressly found as a fact (page 15),

“ 43rd. That this action is not brought to
 “ enforce a liability of the defendants as di-
 “ rectors of a national bank, in accordance
 “ with the provisions of the National Bank-
 “ ing Act, but is a common law action for de-
 “ ceit.

and again (page 18), as a conclusion of law,

“ 16th. That it is conceded herein by the
 “ plaintiff that this is not an action to recover
 “ upon any liability stated in the National
 “ Banking Act against a director or officer of
 “ a national bank.

and,

“ 17th. That this action is not brought to
 “ enforce a liability of the defendants as di-
 “ rectors of a national bank, in accordance
 “ with the provisions of the National Bank
 “ Act, but is a common law action for deceit.

To the same effect also is the opinion of the trial Justice, which clearly discloses the theory upon which the Court proceeded to its conclusion and decision. At page 48, the opinion reads:

“ But here the liability set forth in the com-
 “ plaint is not created by statute; the action
 “ is not a statutory action. It is the common
 “ law action to recover damages for deceit af-
 “ fecting the plaintiff only, not the bank or
 “ the stockholders generally, and must be con-
 “ sidered as such. In the complaint the plain-
 “ tiff has set forth a cause of action for de-
 “ ceit and not a cause of action under the
 “ statute.”

Thus we have an action at common-law for fraud and deceit, declared so to be, not only by the

pleadings, proof, findings, opinion and judgment, but by most solemn concession deliberately recorded in the minutes of the Trial Court. If this is not so, then the English language is incapable of expressing the thought; and by the same token we have a most positive and solemn disclaimer of any intent by the then plaintiff to predicate anything upon the statute, or to recover upon any of the liabilities stated therein (p. 18).

It was then upon this common-law theory that the then plaintiff sought to establish a case, and it was to the elements of such a cause of action that his proof was directed; it was likewise such a cause of action only that the then defendants were called upon to meet; no other charge was preferred against them, nothing other than this to rebut. Nowhere were they apprised in any manner that they were called upon to meet the charge of having knowingly violated the provisions of the statute, nowhere was it suggested that a liability thereon was to be enforced against them; nothing of the kind. On the contrary, they were assured by the most solemn and positive disclaimer of counsel, and by the express statements of the Court, recorded in the minutes, that nothing was being predicated upon the statute, and that the action must stand or fall upon its common-law basis.

Under these circumstances it is asserted with confidence, as a proposition of common sense and sound reasoning, as an argument supported by every consideration of justice and fair dealing, that these plaintiffs in error were justified in con-

sidering the action that which it was labelled, and in confining their defense to such matters as they deemed necessary for their protection against the case made against them, and no other. *And when they asserted, as against the proofs offered by the then plaintiff, the correct legal proposition that such an action could not be maintained, they were entitled to a dismissal of the complaint, then and there.*

Moreover, when the motion was denied the defendants had the right, if they so desired, to rest their defense upon the legal issue thus raised, if they deemed it sufficient for their protection. Any litigant has this right, to confine his defense to the precise issues raised by the pleadings and proofs; and this was exactly what occurred in the case at bar. The then defendants rested upon their assertion that this common-law action for deceit would not lie, and offered only the most formal proof in rebuttal; and if that contention, then made, is right, the judgment against them is wrong.

But having secured his judgment in this action at common-law, upon common-law pleadings and common-law proof, the defendant in error now seeks to sustain it upon quite another and different theory, a theory against which plaintiffs in error have never been permitted to defend. Having thus labelled his action as one brought at common-law, having by express stipulation and solemn concession, led plaintiffs in error to believe that it was only such an action that they were called upon to defend, and that no attempt was being made to recover upon any of the liabilities created by the

statute; having secured a judgment upon findings appropriate only to fraud and deceit, and finding now that such an action cannot prevail, and that plaintiffs in error asserted and relied upon a correct legal proposition when they raised the point in the Trial Court that the action would not lie, he seeks to utterly disregard and hold for naught his express disclaimer, to ignore the entire theory upon which the action was tried and judgment entered, and to sustain his recovery as one based upon the Federal statute. *And this in the face of the stubborn and all-important fact that these plaintiffs in error never had their day in court upon such a charge, and were never afforded an opportunity of defending such an action.*

Under our system of jurisprudence it would not seem that such a contention as that now made by defendant in error can prevail. This would not be justice; it would not be common sense and fair dealing, and it cannot therefore be the law. But this is precisely the situation presented by the record here.

After the Trial Court had rendered its judgment, based upon pleadings, findings and evidence appropriate to a common-law action, and expressly declaring in its opinion that no liability arising from the statute was pleaded or proven, the case went to the Appellate Division of the Third Department of the State of New York for review. That court held that a common-law action for deceit could not be maintained, that the statutory remedy was exclusive, and that the then defendants were correct in the legal proposition upon

which they had rested in the court below. But the judgment was nevertheless sustained, although with a material reduction. The opinion of the court, expressed by Mr. Justice Cochrane, ignores entirely the theory upon which the case was tried, and sustains the judgment solely upon the ground that the pleadings and proof would have warranted a judgment resting upon the Federal statute, and that hence the judgment should be treated as a right decision for which a wrong reason has been assigned in the court below (p. 57).

Subsequently the case was reviewed by the Court of Appeals of New York, and there affirmed, the court adopting the opinion of Mr. Justice Cochrane of the Appellate Division.

With great deference to the opinions of these learned courts, it is still insisted that a grievous error has been committed, not only because the decision reached has ignored and entirely disregarded the theory upon which the case was tried, and is thus in derogation of that familiar rule that the theory followed at the Trial Court is binding upon appellate tribunals, but also because such a decision must result in grave injustice to the plaintiffs in error here, who have never had an opportunity to defend against the charge upon which this judgment for heavy damages is now sustained. Moreover, as it will later be demonstrated, the evidence and findings were insufficient to warrant a judgment based upon the statute, even if there were no force in either of the other contentions made. But this proposition comes later; at this point it is proposed to discuss the grievous injury

which has resulted from the failure of the state courts to afford to these plaintiffs in error a full opportunity of defending against the charge upon which the judgment has now been sustained, and it is here asserted that the result in the case at bar is not only an injustice and a great legal error; it is moreover a taking of property without due process of law, with all that that phrase implies.

There is a marked distinction between the elements which go to make up an action for fraud and deceit, and those which would be required to establish a violation of Section 5211; there is also a radical difference between those matters which might be pleaded and proven by way of defense in these two forms of action. Of this the case at bar furnishes a perfect illustration.

In the first place, it is of the very essence of a common-law action for deceit, so declared in a multitude of decisions, that the representation charged to have been made fraudulently, must have been a *voluntary* statement made with the intent and for the purpose of deceiving. On the other hand, the report described in Section 5211 is not, and cannot be, a voluntary statement, because it is exacted by the mandatory provisions of the statute, and is made for no other purpose. It is a statement which *must be made*, a report *required by law to be filed and published*. It is not made for the benefit of any private person, nor as a representation to him, but rather to the Comptroller of the Currency, for the protection of the state. This distinction is well stated in *Utley v. Hill*, 155 Mo., 232, (cited with approval in 206 U. S., 180), in which it is said:

" Nor can a false statement made by directors of a bank to the secretary of state be made the basis of a common-law action for deceit. The reason is plain. The law exacts the statement; hence it is not voluntarily made. The statement is required to be made to the secretary of state, so that he may take steps to close the bank if it is dangerous to the welfare of the people for it to continue business, but it is in no sense a statement made by the directors with intent to induce persons to deposit their money in the bank, and therefore a common-law action of deceit cannot be predicated upon it."

Again, in a common-law action for deceit it is not always necessary to establish that the party charged actually knew the representation to be false and actually intended to defraud; very often the action is maintained upon circumstances which do not disclose actual knowledge and scienter, but lead rather to the assumption that the defendant knew or *ought to have known* of the falsity of the statement, and he is charged with liability upon the theory that his want of care or reckless inattention has made the injury possible. And it was upon precisely this theory that the Trial Court gave judgment in the case at bar, for it is said in the opinion (p. 50):

" It is not necessary for the plaintiff to show that these defendants actually knew the report to be false; it is sufficient to maintain the action if he shows that the defendants attested this report, not knowing whether it was true or false and not caring what the fact might be, but recklessly paying no heed to the injury which might ensue.
" Kountze vs. Kennedy, 147 N. Y., 234,
" 129.

“Fraud is proven when it is shown that a false representation has been made knowingly or without belief in its truth or recklessly without caring whether it be true or false.”

On the other hand, however, it is expressly declared by the provisions of the Revised Statutes (Sec. 5239) that the directors shall be liable only in case they shall

“*knowingly* violate, or *knowingly* permit any of the officers, agents or servants of the association to violate any of the provisions of this title.” (Italics ours.)

And this statute has been so strictly construed as to require proof of something more than mere negligence and recklessness; nothing short of an intentional violation will suffice.

Yates v. Jones, 206 U. S. , 180.

Utley v. Hill, 155 Mo., 232-264.

McDonald v. Williams, 174 U. S., 397.

Again, in certain actions for fraud parties are often held liable for the deceit of agents in whom they have vested authority to act, although no actual knowledge of the agents' fraud is shown; and this upon the theory that of two innocent persons he who makes the injury possible must suffer.

But this could not be possible under the statute where the only ground upon which a director could be held liable for a violation by an agent or servant must be that he “knowingly” permitted the wrong.

From all this it will be seen that there are, or may be, many radical differences between the degree of proof required to substantiate a claim laid at common law, and one based upon the statute; and this is likewise true of the defense. Many matters might be set up and established as defenses against an alleged violation of the statute, which would not bear the same relevancy to an action at common law, and which might not be admissible there. Let us consider this in its direct bearing upon the case at bar.

Having been assured that this was only a common-law action for deceit, the then defendants moved at the trial for its dismissal, and rested. Now, had the action been considered as based upon the Federal statute, there were many matters of defense which they could and would have interposed to such a charge, but which they had the right to, and were justified in omitting at the time. Among other such matters, the defendants, as against the charge of having "knowingly violated" the statute, could, each and all of them, have taken the stand and fully developed their relations with the bank. They could have shown their utter lack of knowledge of the details of its operations, their entire ignorance of the falsity of the report, their belief in its correctness, their implicit confidence in the officer who prepared it. They could have testified, and it would have been a good defense, that they relied upon the cashier to prepare a correct and legal statement, that they believed him fully capable of this, and that the experience of years had hitherto justified their confidence. They could

also, each and every of them, have declared in express terms that they at all times acted in good faith, that they did not intend a wrong; and they could have denied that they either "knowingly violated" or "knowingly permitted" any violation of the act.

All this, and much more, could, and would, have been presented by way of defense, had these directors been called upon to defend the statutory action; and none of these matters were at all necessary to the case as presented, even if in any wise relevant. And whether relevant or not, they would surely not have had the same probative force and effect in a common law action as in one based upon the statute; for while in the statutory action there must be proof that the violation was "intentional" and was "knowingly" done or permitted, this would not be true of the common law case, where, as was said by the trial court (p. 50):

"It is not necessary for the plaintiff to show that these defendants actually knew the report to be false; it is sufficient to maintain the action if he shows that the defendants attested this report, not knowing whether it was true or false and not caring what the fact might be, but recklessly paying no heed to the injury which might ensue."

Judge Van Kirk, in attempting to justify his decision, stated the common-law rule in the strongest terms of which it is capable, and this, when compared with *Yates v. Jones* (supra), clearly points out the radical difference between the two actions, and indicates the separate degrees of

proof required in each; and, as we have seen, as the plaintiff's side is different, so also must be the defendant's.

It cannot then be argued, in all fairness and justice, that plaintiffs in error here were not deprived of most substantial rights by the affirmance of this judgment as a statutory recovery, when in fact the case was tried at common-law; for by this course they have been denied the opportunity of presenting most relevant and material proofs, of sustaining by evidence most vital and pertinent matters of defense. And this right to so defend is an important property right, to which protection is guaranteed by the fundamental law of the land, which prohibits the deprivation of such a right without due process of law.

If this reasoning be sound, and shall commend itself to the court, or if for some other reason which has not been suggested, there can be found a substantial difference between the two forms of action, then it is asserted, as a self-evident and indisputable proposition, that these plaintiffs in error have never had their day in court upon the charge of having "knowingly" violated the statute, and have never been afforded an opportunity of defending against that precise accusation. And a judgment based upon a charge never made and never defended, must, under the circumstances of this case, be a taking of property without due process of law, in the truest sense of that term.

Such is precisely the situation here; valuable property rights are to be taken away upon a charge

never asserted against plaintiffs in error, and upon a theory of liability expressly disclaimed, and where it is clear that the plaintiffs in error have successfully defended against the charge made, and might have just as successfully defended against that other upon which recovery is now predicated.

It is well within the power of this court to protect a litigant from such injustice, for a constitutional question is here involved, and in any event it is the peculiar province of this court to construe and interpret the provisions of the Revised Statutes of the United States, and to declare in what manner and upon what acts a violation of Section 5211 may be predicated.

The proceedings by virtue of which it is sought to impose upon these plaintiffs in error a severe penalty and to mulct them in heavy damages, do not in any sense constitute that "due process of law" to which every citizen is entitled under the Constitution, and which has been his dearest right since Magna Charta. Due process of law means a legal proceeding appropriate to the case and just to the parties, a proceeding instituted and pursued in the ordinary manner prescribed by law, *and which, above all else, gives the party to be affected a full opportunity to be heard respecting the justice of the judgment proposed to be rendered against him.*

Burton v. Platter, 10 U. S. App., 657-663;
53 Fed., 901-904;
Gentry v. U. S., 101 Fed., 51;
In re Rosser, 101 Fed., 562-567;

Galpin v. Page, 18 Wall., 350-368;
 Windsor v. McVeigh, 93 U. S., 274;
 Hovey v. Elliott, 167 U. S., 409-414;
 Simon v. Craft, 182 U. S., 427-436;
 Holden v. Hardy, 169 U. S., 366-391;
 Merrill v. Rokes, 12 U. S. App., 183;
 Garfield v. Goldsby, 211 U. S., 249-262;
 Bailey v. Alabama, 219 U. S., 219-238;
 Moyer v. Peabody, 212 U. S., 78-84.

These cases, and a multitude of others which might be cited, establish beyond any question that however difficult it may be to frame a definition of the term which shall be adaptable to all circumstances and conditions, still this one thing is certain, that there must always be full notice of the nature of the charge alleged, and full opportunity to defend against it. And if in any given case these two essential elements do not exist, then there has been a failure of "due process of law," and the constitutional limit has been transcended. I quote briefly from the Burton case (53 Fed., 905), where a situation somewhat similar to the case at bar was presented:

" Nothing can better illustrate the injustice
 " and irregularity of this proceeding than the
 " statement of these facts. No notice of the
 " ground on which the judgment was to be
 " rendered, no opportunity to contest their
 " execution of the bond or their liability upon
 " it, was given to any of these interveners un-
 " til after the hearing was concluded, and the
 " master's report filed. To all these they were
 " entitled as a matter of right, by the rules
 " and forms established by the courts for the
 " protection of private rights. *No rule is*
 " *more salutary or better settled in the courts*
 " *than that one may not bring and try his suit*
 " *upon one cause of action, and recover a*

" judgment or decree upon another. In an action of ejectment he cannot have judgment upon a promissory note which is neither pleaded nor proved; nor can he, in an action of replevin, where the only question at issue is the right to the possession of personal property, without notice, pleading, or proof, recover a decree or judgment upon a bond. A judgment or decree, to be valid, must be according to the allegations and the proofs. This judgment is according to neither, and upon this ground, so far as the interveners are concerned, it must be reversed." (Italics ours.)

and from *Gentry v. U. S.* (supra), where the rule and its reason were thus plainly and concisely stated (101 Fed. 51):

" One may not bring a suit for one cause of action, and recover judgment for another. A court can consider only what is in issue under the pleadings. Averments without proofs, and proofs without averments, are unavailing. The judgment may not go beyond a determination of the issues presented by the pleadings, nor beyond the scope and object of the prayers they contain. These are axioms in the law of pleading and practice. They rest upon the basic principles of our jurisprudence, that no man shall be deprived of his life, liberty, or property without due process of law; and due process of law must give to the parties to be affected an opportunity to be heard respecting the justice of the judgment sought. It must be one which gives notice of the issue to be determined, which hears before it condemns, proceeds upon inquiry, and renders judgment only after trial. *Burton v. Platter*, 10 U. S. App., 657, 663, 4 C. C. A., 95, 99, 53 Fed., 901; *Taussig's Ex'rs v. Glenn*, 4 U. S. App., 524, 541, 2 C. C. A., 314, 318, 51 Fed., 409, 413; *Merrill v. Rokes*, 12

"U. S. App., 183, 188, 4 C. C. A., 433, 435, 54
 "Fed., 450, 452; *Live-Stock Co. v. Blackburn*,
 "30 U. S. App., 571, 579, 17 C. C. A., 532, 536;
 "70 Fed., 949, 954; *Wood v. Collins*, 23 U. S.
 "App., 224, 230, 8 C. C. A., 522, 525, 60 Fed.,
 "139, 142."

These remarks are of the most pertinent significance to the case at bar, and must at once condemn the judgment of which plaintiffs in error complain. And upon this rule of the organic law the plaintiffs in error rest the assertion that there has not been accorded here that "due process of law" which is essential to a righteous judgment, for here there has never been an opportunity to defend, nor even the merest suggestion of the charge upon which the judgment is based.

For this further reason, then, the plaintiffs in error are entitled to succeed in this court; they have been deprived of their property without due process of law.

III

No violation of the statute was shown, even if the proper remedy had been invoked.

Waiving aside for the moment all that has been heretofore argued, and assuming now for the mere sake of argument that an action based upon the statute has been duly instituted, and the proper remedy invoked, it is still insisted that there is nothing in the record which warrants the judgment.

The only ground upon which directors can be held liable under the Federal statute is therein declared in precise and definite terms; there must be a violation "*knowingly done*" or "*knowingly permitted*." Such is the plain mandate of the statute, and so it has been construed by this court in *Yates vs. Jones National Bank*, 206 U. S., 158-180, so often cited in this brief. I again quote from the opinion of Mr. Justice White at pages 179-180:

"The error in the decision below becomes
 "at once apparent when its correctness is
 "tested by the rule that the statute is applic-
 "able and prescribes the exclusive test of lia-
 "bility. The doctrine, as we have seen, upon
 "which the court below rested its judgment,
 "was that directors of a national bank who
 "merely negligently participated in or as-
 "sented to the making and publishing of an
 "untrue official report of the condition of the
 "bank were civilly liable to anyone deceived
 "to his injury by such report. Indeed, in one
 "aspect, the ruling below went further than
 "this, since it was, in substance, decided that
 "despite the exercise of diligence by the di-
 "rector, if he attested an untrue report he was
 "civilly liable because he did so at his risk,
 "since it was his duty to know or to refrain
 "from acting. That this imposed a higher
 "standard of conduct than was required by
 "the statute is obvious, but is clearly also es-
 "tablished by previous decisions of this court,
 "pointing out that where by law a responsi-
 "bility is made to arise from the violation of
 "a statute knowingly, proof of something
 "more than negligence is required, that is,
 "that the violation must in effect be inten-
 "tional. *McDonald vs. Williams*, 174 U. S.,
 "397; *Potter v. United States*, 155 U. S., 438,
 "446, and cases cited. See also *Utley v. Hill*,
 "155 Missouri, 232, 264 et seq. and cases
 "cited."

Now unless counsel for plaintiffs in error has entirely misapprehended the effect of this recent decision, if he has not wholly misread the plain language of the statute, it may fairly be premised that in order to warrant a judgment for damages caused by the violation of Section 5211, there must be proof that the violation was "*intentional*," that it was "*knowingly*" done or permitted, and nothing short of this will suffice. Negligence and carelessness, recklessness or ignorance, will not do, however gross or unreasonable they may be. Neither can such a charge be successfully predicated upon a mere error of judgment. This is the true intent of the statute, and it is so written in precise and definite terms.

In the case at bar the proof falls far short of this standard of liability; there is not the slightest suggestion of evidence establishing, or tending to establish, such an intentional and knowing violation of the act. The record here does not even show carelessness or inattention; it may disclose an error of judgment, but nothing more. No intentional violation is exhibited, nor any of the essential elements of such a charge; in fact, the direct contrary is shown by the plaintiff's own testimony. For convenience this portion of the argument may be set forth in separate subdivisions.

(a)

The report was a true and correct statement of the condition of the bank as shown by its books. This is established by the evidence and findings, and is nowhere disputed.

The Cashier of the bank testified at page 45 in these words:

"The statement published was a true statement of the condition as shown by the books."

And the trial court finds, at page 10:

"9th. That the said statement of its condition on March 28, 1904, as published by the said Citizens National Bank and marked 'Correct Attest' by said defendants, was a true statement of such condition as shown by the books of the bank at that time."

We may start this discussion therefore with this established fact, that the report which was attested and published was in all respects a correct statement of the condition of the bank as shown by the books. And we must have in mind also that further and most important fact, that it was verified by the Cashier of the institution, that officer to whom the preparation of such a report is usually entrusted (p. 8).

But it is said that the books themselves did not correctly state the condition of the bank, and that therefore the report taken therefrom did not truthfully set forth the resources and liabilities, as required by Section 5211 of the Revised Statutes. It is also charged that the directors knew, or should have known, that such was the case.

The sole respect in which the report is thus attacked as incorrect, is that it included among the apparent resources of the bank certain items amounting in the aggregate to \$194,107.02, to

which the attention of the bank had been called by a letter from the Comptroller of the Currency, stating that they must be regarded as "doubtful assets," and that immediate steps should be taken to collect them, or to remove them out of the bank, of which letter the defendants had knowledge when they attested the report. A list of these items is shown at page 43. Their knowledge of this letter, and their failure to see that the alleged doubtful assets were not included in the report, furnishes the only excuse for the judgment, and the only basis upon which liability is predicated. There is no other accusation in the case. It is submitted that this is not quite enough under the circumstances here disclosed.

(b)

The letter of the Comptroller of the Currency was not a final decision upon the value of these assets, which compelled the directors to immediately treat them as worthless.

The Comptroller had stated that certain loans aggregating \$194,107.02 must be regarded as doubtful assets. For the purposes of this argument we may assume that these directors had knowledge of the contents of this letter, and that they attested the report either with knowledge that the items mentioned in the letter were included in the report, or without taking pains to ascertain whether they were or were not so included. Is this enough to warrant a judgment for the liability created by the statute, which expressly provides that nothing short of a knowing

violation of its provisions shall be made the basis of a conviction? Is this enough, under the decision of the Yates case, which declares in terms that nothing short of an intentional violation of the act will suffice? It would not seem so. It cannot be that a mere letter of the Comptroller is to be given such final and conclusive effect that immediately upon receipt of such a letter, or within thirty days thereafter, the directors of a National Bank must consider such assets worthless and omit them entirely from the list of its resources. It cannot be that the Comptroller's ex parte decision is for all purposes binding and controlling; there must still remain in the officers of the bank some discretion to be exercised in the premises. Nor are these officers compelled to collect such assets within so short and so arbitrary a period; this would scarcely be reasonable when considered in reference to securities aggregating in value \$194,107.72. Such a rule would be destructive of all business customs, and would moreover render the duties of a director altogether too hazardous, and too exacting, for the class of men who usually occupy such positions. It would impose a duty which could not in reason be performed; and such an interpretation of the statute would be entirely out of harmony with the ordinary rules of business and the settled customs of banking.

That such a declaration of the Comptroller should not have this final and conclusive effect, and that the directors should not be compelled to at once charge off the doubtful assets, and treat them as uncollectible in the published report, is perhaps as well illustrated by the case at bar as

by any situation which could be supposed. *For upon this list so treated as doubtful, approximately \$97,000 was afterwards realized, over one-half of the total. This also is conceded* (p. 43).

Thus this court is asked to condemn these directors because they did not at once treat these securities as uncollectible, and entirely omit them from the list of resources stated in their report, when in fact over one-half the amount was collected prior to the commencement of this action. This is far too harsh a rule.

The most that can be charged against these directors is that in the consideration of the value of these alleged doubtful securities their judgment was erroneous by one-half; but they cannot be held liable for this error in judgment any more than can the Comptroller of the Currency whose error was greater. Judgment here cannot be based upon an error of judgment, for that is something far other and different from the intentional violation which the Yates case requires.

The most that can be said of the Comptroller's letter is that it was in the nature of a warning; it was not *res adjudicata* as to the value of these loans, and these directors were not required because of their knowledge of this letter, to at once omit from their published report all these securities, over one-half of which subsequently turned out to be of their full face value.

Let us suppose that instead of including the entire \$194,107.72 of doubtful assets in the report,

the directors had only included that \$97,000 which was subsequently collected. Would they then be liable? No reasonable man can answer this question in the affirmative; and yet I think if the claim of the defendant in error is to prevail, the directors would be as culpable as in the present case. For their liability depends entirely, if this judgment is to be sustained, upon having included in the list of resources these doubtful securities, simply because the Comptroller's letter had been called to their attention. And if in the case supposed, the directors could absolve themselves from liability by subsequently realizing upon all of the alleged doubtful securities, then they are being held liable here for a mere error of judgment. There is no escape from this conclusion. The language of the court in *United States vs. Graves*, 53 Fed. Rep., 634 (cited 139 Fed. 967); reversed on another ground in 165 U. S., 323, is of pertinent significance here, and I therefore quote quite fully from the opinion. It was there said:

"The entry of loans and discounts in reports to the Comptroller does not guarantee the solvency of the makers of the paper, but is a statement that in truth and fact, at the date named in the report, the bank actually held and owned loans and discounts to the aggregate so reported."

And again at page 646:

"This bank appears to have carried on their books from day to day certain loans and discounts under the heading of 'Suspended Loans,' and the testimony tends to show that those suspended loans had been

"theretofore carried on the books under the
 "heading of 'Loans and Discounts,' but had
 "been withdrawn therefrom as objectionable
 "paper or loans having an improbability of
 "payment, and were temporarily carried un-
 "der the heading of 'Suspended Loans,'
 "awaiting the action or decision of the board
 "of directors as to these suspended loans be-
 "ing withdrawn or charged off from the char-
 "acter of loans, and entered upon as a loss on
 "the profit and loss account. I do not under-
 "stand the government seriously disputes the
 "correctness of these suspended loans being
 "placed in and made a part of the loans and
 "discounts entry in the report to the Comp-
 "troller; for the explanation given would still
 "give these suspended loans the character of
 "loans and discounts, as being carried on the
 "books of the bank in good faith as a part of
 "their actual loans and discounts, though, as
 "I understand, temporarily, and for the con-
 "venience of the bank, entered on its books
 "under another heading, viz: 'Suspended
 "'Loans.' And therefore when defendant
 "added the aggregate of said suspended loans
 "account to the aggregate of loans and dis-
 "count account, as shown on the books, de-
 "fendant in so doing did not make a false
 "entry. He believed them to be loans and dis-
 "counts, and he was justified in so believing,
 "and in good faith so reported them, and un-
 "der the circumstances did not as to that par-
 "ticular make a false entry. The entry of
 "loans and discounts in reports to the Comp-
 "troller does not guarantee the solvency of
 "the makers of the paper, but it is a statement
 "that in truth and in fact, at the date named
 "in the report, the bank actually held and
 "owned loans and discounts to the aggregate
 "therein reported."

"The evidence does not disclose that any
 "particular method or system of bookkeeping
 "is demanded of a National Bank. It is not
 "required to conform its headings of the vari-
 "ous accounts to any prescribed names, nor

“to the names stated in the form of report prescribed by the Comptroller; and therefore when a report is called for, if the person making it enters under the headings in the prescribed form a true statement of the bank’s condition on the day called for in respect to the headings in said form, he has fulfilled the demands of the law; and the application of this proposition I have just illustrated as to the item of suspended loans.”

See also:

Potter vs. U. S., 155 U. S., 438.
 U. S. vs. Young, 128 Fed. Rep., 111.
 Coffin vs. U. S., 156 U. S., 446.
 Graves vs. U. S., 165 U. S., 324.
 Twining vs. U. S., 141 Fed. Rep., 41.

These remarks are the common sense of the situation, and they must therefore be the law of the case; any other rule would create a most unreasonable standard of liability, and would render it unsafe for men of ordinary affairs to lend their gratuitous and valuable services to such institutions.

Even in the case at bar the Trial Justice conceded all this in the opinion in which it was sought to justify the judgment at common law for fraud and deceit. At page 52 the learned Trial Justice said this:

“The Comptroller’s warning that book assets were doubtful, to the amount of \$194,000 is not proof that the assets were in fact valueless to that amount, but the assessment directed by the Comptroller is evidence that its book value was then nothing.”

This exhibits at once the false basis upon which this judgment is predicated; for if these directors did not violate the statute in failing to omit from the list of resources these doubtful securities, they were not guilty of any violation of the act. If it were not wrong for them to include the assets in the statement, then their having included them at their face value, instead of at \$97,000, is at most a mere error of judgment as has been repeatedly stated, and as is here most earnestly and insistently contended.

Nor is the fact that an assessment was subsequently levied sufficient to warrant this judgment; such an assessment may constitute some evidence of the condition of the bank at that precise time, but it cannot be, in and of itself, sufficient to warrant the assertion that these securities were in fact uncollectible, and were known so to be at the time the report was attested. The question here does not relate to the actual value of the stock, or to the actual condition of the bank, but rather to the intent with which this published report was made, and to the knowledge, or lack of knowledge, of its falsity which these directors actually possessed.

And in this connection it must be borne in mind that the assessment was made on the 30th day of June, three months after the report was attested (p. 33).

It may have some relevancy to the issue, and is here submitted as a matter worthy at least of comment, that there is no proof in the case that the balance of these doubtful assets cannot be in whole, or in part, collected. It is true that at the time

of the action they had not been actually realized upon, but this is not proof conclusive that they were without value, unless the Comptroller's letter is to be given that effect, and as we have seen, this would be a most precarious and uncertain test; for as the Comptroller's letter was in fact erroneous by one-half, so also he may well have been in error as to all.

For these reasons it is submitted with confidence that when the record is reviewed by this court, in the light of a fair and reasonable construction of the statute, it will be seen that the judgment against these plaintiffs in error is without fact in its support, and without reason in its defense.

IV

There is no sufficient evidence that the defendant in error suffered damage by reason of any act of the plaintiffs in error.

Section 5239 reads, so far as material here, thus:

"And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders or any other person, shall have sustained *in consequence of such violation.*"

Without intending in any wise to abate the force of what has been heretofore argued, it is submitted further as a just reason for the reversal of this

judgment, that there is no sufficient proof to establish even inferentially that the defendant in error has sustained any damage in consequence of any act of these directors; and without further argument the court is referred to the testimony upon this subject. It is to this effect:

By the Defendant in Error—That he purchased the stock through W. R. Waterbury, his brother-in-law (p. 29); that he did not himself see the published report prior to the time the stock was purchased (pp. 29, 34); that Waterbury spoke to him about purchasing the stock (pp. 29, 33); that he had no other information except what he obtained through Waterbury (pp. 29, 30); that Waterbury told him that he had seen and examined the last published statement (pp. 30, 34), and what the report showed as to amount of capital, surplus and undivided profits (pp. 31, 35), and that he thought it a good investment and would not think of parting with his stock for the price mentioned (pp. 30, 33, 35); and that he relied upon the statements Waterbury made to him (pp. 29, 34, 35); and took his word as to what the published statement showed (pp. 31, 34, 35), and bought the stock, relying almost entirely upon Waterbury's judgment (pp. 34, 35), and was guided almost entirely by Waterbury's judgment (p. 35); that he believed that the last published statement of the bank did contain the statements, which Waterbury made to him, as to amount of capital stock, surplus and undivided profits (pp. 31, 34, 35), and that he relied upon such statement (p. 31); that before purchasing the stock, and after he and Waterbury had had their first conversation about it, he had Waterbury look up and investigate concerning it

(p. 35), and it was after Waterbury reported to him the result of his investigations that he purchased the stock, (pp. 30, 35). The matter of purchase of the stock was first suggested by Waterbury (pp. 28, 29, 33), and Waterbury told him how much the stock was paying in dividends (p. 33), and generally and strongly recommended to him the stock as an investment—as reference to such pages will show.

Waterbury testified to much the same effect, and also testified as to his investigations and report thereon to plaintiff (p. 41), and that he had seen the report and relied on it, and communicated to Taylor what the report showed as to amount of capital stock, surplus and undivided profits.

From the testimony it clearly appears that defendant bought the stock entirely on the advice and suggestion of Waterbury. He did not rely very much, if any, on what the last published statement showed, for he, after being told what it showed, had Waterbury investigate further, and asked as to the future (p. 30) and did not purchase until Waterbury had investigated and then told him he thought it good stock to buy. In his investigation Waterbury went outside the report, and when he reported to defendant depended upon what he had learned from his outside investigation.

Giving to this testimony all the force and effect that it can possibly have, it still falls far short of establishing that this defendant in error suffered damage by reason of the act of the plaintiffs in error in attesting the report, even if they could be said to have violated the act in so doing.

V

The Court of Appeals of the State of New York erred in affirming the decision of the Supreme Court to the effect that the notice from the Comptroller of the Currency on the 27th day of June, 1904, was an adjudication or notice that the capital of the said bank was impaired in March, 1904. The said Court also erred in affirming the decision of the Supreme Court to the effect that the letter from the Comptroller of the Currency to the bank that a certain list of notes therein mentioned were considered doubtful, and that immediate steps must be taken to collect or remove them from the bank, was evidence that such assets were in fact doubtful.

Without holding and deciding that the letter and notice from the Comptroller were evidence of the facts therein stated, it was impossible for the State Court to conclude that the published statement of the condition of the bank as attested by the plaintiffs in error was false.

In addition to what has been previously said in this brief concerning such letter and notice, we desire to add that while the notice of the Comptroller levying the assessment on the stockholders was conclusive upon the stockholders and resulted in the payment by the defendant in error of the assessment on his stock, there is nothing in the record to show that such assessment was levied because the assets referred to by the Comptroller in his letter were in fact doubtful. The levying of the

assessment occurred nearly three months after the published statement had been attested by the plaintiffs; and even though it was evidence that the bank's capital was impaired on the date when the assessment was ordered, it was not competent evidence to show that the plaintiffs in error knew when they attested the report, that the capital stock was impaired and its surplus or any part thereof, wiped out or that the directors attested the report with the intention of knowingly violating the statute. The directors had the right and it was their duty to include the assets referred to in the letter of the Comptroller in the published statement for the reason that such assets were on hand, and there had been no adjudication at that time that they were doubtful, nor had they been charged off.

In *Lord v. Jenness*, 13 Howard, 198, which was an action brought against certain persons for giving a commercial letter of recommendation with intention to defraud and deceive, whereby the party to whom the letter was addressed gave credit and sustained loss, it was held that the question for the jury was whether or not there was fraud and an intention to deceive in giving the letter; and that if there was no such intention, and if the parties honestly stated their own opinion, believing at the time that they stated the truth, they were not liable, although the representation subsequently turned out to be entirely untrue.

To the same effect also:

*Penn Mutual Life Ins. Co. vs. Mechanics
Savings Bank and Trust Company*, 73
Fed. Rep., 653, and
Brady v. Evans, 78 Fed. Rep., 558, 560.

The plaintiffs in error were authorized under the letter written by the Comptroller to retain the assets to which he called attention, and make an effort to collect them. The evidence shows that at the time of the trial over one-half of them had actually been collected. There is nothing to show but that the other half, or a goodly portion of them, might in time be collected. And in any event, the Comptroller's judgment was not binding on the bank or the directors at that time. The only authority which the Comptroller had, if he deemed these assets so doubtful as to be worthless, and by reason thereof the capital stock and surplus to be affected, was to direct an assessment, and in default of its being levied and collected, to put the bank into liquidation; and until this was done the bank was authorized to carry these items and list them as assets. This he did not do until June 27th, 1904. The directors were therefore authorized to use their judgment concerning these assets and to include them in the statement. In any event, as has been previously urged herein, and as was held by Judge Woolson in *United States vs. Graves* (supra) the entry of loans and discounts in reports to the Comptroller does not guarantee the solvency of the makers of the paper, but is a statement that in truth and in fact at the date named in the report, the bank actually held loans and discounts to the aggregate so reported.

Until the Board of Directors had declared these assets worthless, or had directed them to be charged off, they had to be included in the statement, and the plaintiffs in error had no alternative. The report was the report of the bank, and

was attested by the plaintiffs in error as required by the statute (Section 5211). And had the statement omitted these assets the plaintiffs in error in attesting the report would have been guilty of making a false entry in the report under Section 5209 of the R. S. and would have been liable to the bank and the stockholders under Section 5239 for the damages which would have resulted from omitting them.

Hanna vs. Lyon, 179 N. Y., 107.

The report was called for by the Comptroller and it had to be made, and it also had to be attested to comply with the statute; and because the plaintiffs in error attested a report which correctly set forth and showed the assets and liabilities of the bank, as shown by the books of the bank, they have been held liable. Had the report failed to show these assets and liabilities they would have been liable under Sections 5209 and 5239, for not including these assets while they were still carried on the books of the bank and had not been declared worthless by the Board of Directors—the only authority there was for declaring them worthless.

The plaintiffs in error could not be indicted for attesting this report, because the report contained no false entry; it was true; and this being so they cannot be held liable in this action.

VI

Defendant in error has mistaken his forum, as this action cannot be maintained in a State Court.

Section 5239 of the Revised Statutes of the United States provides that if a director shall knowingly violate any of the provisions of Title 62 he shall be liable

“for all damages which it * * * or any
“other person shall have sustained in conse-
“quence of such violation.”

And further:

“Such violation shall, however, be de-
“termined and adjudged by a proper Circuit,
“District or Territorial Court of the United
“States in a suit brought for that purpose by
“the Comptroller of the Currency in his own
“name, before the association shall be de-
“clared dissolved.”

Entirely aside from the point that an action against a bank director for a violation of Section 5239 could not be maintained until there had been a forfeiture of the charter, we maintain that an action under Section 5239 can only be brought in the Courts of the United States.

There is nothing in the language of the Court in *Yates vs. Jones National Bank*, 206 U. S. pp. 180-181, contrary to this view. Apparently, the only question discussed by the Court in the last two paragraphs of the opinion is as to the right to sue a director before a forfeiture of the bank's

charter has been adjudged. Aside from this point we urge that Section 5239 does not authorize a suit against a National Bank director, nor does any other provision of Title 62, U. S. R. S., authorize such a suit except in Courts of the United States, and an examination discloses that this is the rule.

As National Banks derive their existence and organization solely from the acts of Congress, which make provision for the punishment of certain crimes committed by bank officers and agents, it would seem that the Federal Courts have exclusive jurisdiction of such offences, notwithstanding the existence of State statutes punishing these offences, for by the terms of the Judiciary Act the Courts of the United States are vested with exclusive cognizance of all crimes that are made punishable by acts of Congress, except when the act of Congress makes other provisions.

In re Eno, 54 Fed. Rep., 669.
State vs. Fuller, 34 Conn., 280.
Com. vs. Felton, 101 Mass., 204.
People vs. Fonda, 62 Mich., 401.
Com. vs. Ketner, 92 Pa. St., 372.

The Federal Courts have exclusive cognizance of the offence of embezzlement of the funds, etc., of a National Bank, and the offence is punishable only under United States Statutes.

U. S. vs. Buskey, 38 Fed., 99.
State vs. Tuller, 34 Conn., 280.
Com. vs. Felton, 101 Mass., 214.
Com. vs. Ketner, 92 Pa. St., 372.
People vs. Fonda, 62 Mich., 401.

State Courts have jurisdiction of offences by National Bank officers for which the acts of Congress have not made provision.

State vs. Tuller, *supra*.

State vs. Fields, 98 Ia., 748.

State vs. Bardwell, 72 Miss., 535.

As directors are punishable under the United States Law for a violation of the provisions of Title 62, and as the National Bank Act contains within itself the rights, remedies, and penalties for any transgression of those provisions, we submit that the United States Courts alone would have jurisdiction of an action of this character.

VII

The judgment is not in accord with the right and justice of the case; it moreover violates those settled rules and principles to which attention has been called. It should be reversed.

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L. B. McKELVEY,

Of Counsel on the Brief.

27
Circuit Court, U. S.
FILED.

JAN 27 1912

JAMES H. MCKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911

No. 171

CASSIUS B. THOMAS, WILLIAM D. EDDY
AND EDGAR D. STARBUCK,

Plaintiffs in Error,

against

WILLIAM C. TAYLOR,

Defendant in Error.

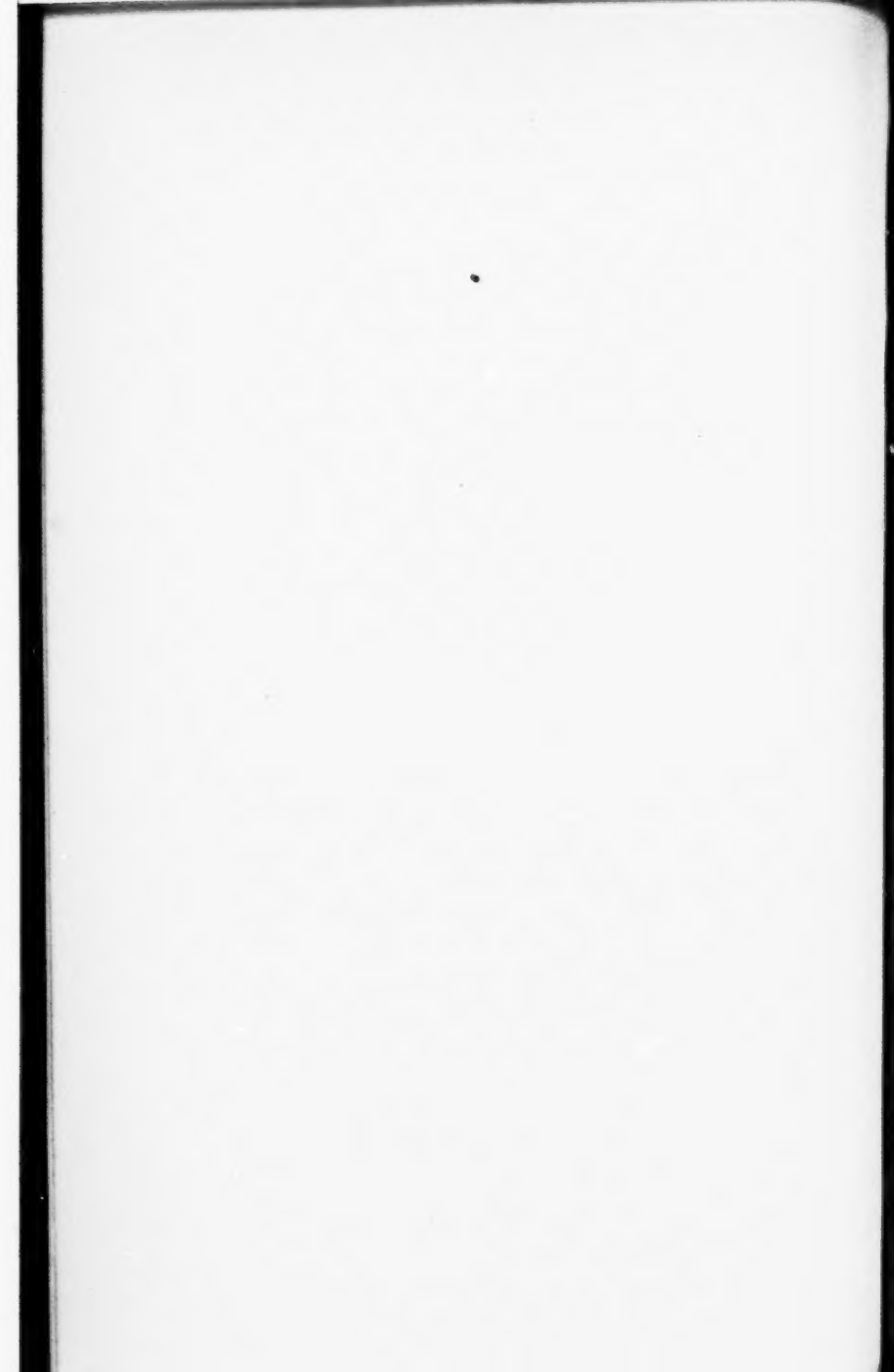
BRIEF ON BEHALF OF DEFENDANT IN
ERROR UPON A WRIT OF ERROR TO
THE COURT OF APPEALS OF THE STATE
OF NEW YORK.

EDGAR T. BRACKETT,

Attorney for Defendant in Error,

Town Hall,

Saratoga Springs, N. Y.



IN THE

SUPREME COURT

OF THE UNITED STATES.

CASSIUS B. THOMAS, WIL-
LIAM D. EDDY and EDGAR
D. STARBUCK,

Plaintiffs in Error,

— vs. —

WILLIAM C. TAYLOR,
Defendant in Error.

The plaintiffs in error come here upon a Writ of Error granted by Justice Harlan in December, 1909, to review a judgment entered upon an affirmance by the Court of Appeals of the State of New York, of an order of the Appellate Division of the Supreme Court, Third Department, which, in turn, modified and, as modified, affirmed a judgment in favor of the defendant in error, against the plaintiffs in error, entered in the Saratoga County Clerk's office, upon a decision at Special Term, directing judgment. (See Writ, pp. 69, 70; Remittitur of the Court of Appeals, pp. 59, 60; Order making judgment of the Court of Appeals the judgment of the Supreme Court; judgment on the affirmance by the Court of Appeals p. 61.)

The decision of the trial court directed judgment against the three defendants for the sum of \$4,800 and interest, (pp. 19, 20, 21) for which judgment was entered (pp. 21, 22). The order of the Appellate Division reversed this judgment, unless the plaintiff stipulated to deduct therefrom the sum of \$2000 and if such stipulation was given, affirmed (pp. 52, 53). The stipulation was given (p. 53) and judgment of affirmance, as modified, entered (p. 54).

The action was brought by the plaintiff below, to recover from the defendants the sum of \$4,800, the interest thereon from July 1st, 1904.

The complaint alleges:

(a) The existence of the Citizens National Bank as a domestic corporation, organized under the Banking Laws of the United States, doing business at Saratoga Springs; that the defendants were directors, and John H. DeRidder the Cashier thereof, (p. 2).

(b) That on or about the 6th day of April, 1904, in pursuance of a call of the Comptroller of the Currency, the Cashier made and verified a report of the condition of the bank at the close of business on the 28th day of March, 1904, and that, as required by statute, the correctness of such report was attested by the defendants, who were directors of the bank, and was published as required by the National Banking Act, (p. 2).

(c) That, among other things, said report thus attested by the defendants stated that the capital stock of the bank was \$100,000, the surplus \$50,000, and its undivided profits \$13,456.75, and that, by attesting the same, the defendants represented that the same was correct, (p. 2).

(d) That in or about the early part of June,

1904, the attention of the plaintiff was called to the stock of said bank as an investment, and, believing the representations made in said report thus attested by the defendants to be true, and relying upon the same, he purchased thirty shares of the stock of said bank, and paid therefor the sum of \$160 per share, in all the sum of \$4800, (p. 3).

(e) That had said statement contained in the report been true, as certified by the defendants, such stock would have been worth such sum, or more, and would have been a valuable and safe investment for the plaintiff, for the amount for which he purchased the same, (p. 3).

(f) That except for such statement thus attested by the defendants, and if he had not relied upon and believed the same, the plaintiff would not have made such purchase of stock, (p. 3).

(g) That the statement thus made and published, and attested by the defendants to be true, was false in the following particulars:

The bank had no surplus of \$50,000, nor of any other sum, nor undivided profits of \$13,456.75, nor of any other sum; that the capital stock was not in existence, and unimpaired, to the amount of \$100,000, but on the contrary had been so impaired that the same was practically wiped out, and there was of the same remaining, not to exceed \$10,000, if so much; that the banking house and furniture and fixtures of the bank were not of the value of \$33,000, nor of any other sum greater than \$10,000, if so much; that the stock of the bank was without any value whatever, or did not have a value to exceed 10% of its face, at the time the defendants attested

said report, and when the same was published, nor at the time the plaintiff purchased such stock, nor was such stock ever worth a greater sum than 10%, if so much, until the payment of the assessment as hereinafter stated, (p. 3).

(h) That, thereafter, such proceedings were had that the stockholders of the bank authorized and ordered an assessment of 100% to be made upon the capital stock thereof, which assessment was approved and ordered by the Comptroller, and, thereupon, the plaintiff paid \$3000 assessment, in order to save such stock from sale, and continued to own the same, and thereby the value of such stock was increased by \$3000, the amount thus paid by the plaintiff, (p. 3).

(i) That at the time the defendants attested such statement as correct, they knew that it was not correct, and was false, and it was thus attested by them with the intention of deceiving the public, and, among others, the plaintiff, and any one who might deal with said bank, or in said stock, by causing them to believe that the bank was in a prosperous condition, had an unimpaired capital of \$100,000, a surplus of \$50,000, and undivided profits of \$13,456.75; that its banking house furniture and fixtures were worth the sum of \$33,000, and that said stock was worth the sum of at least \$166 a share, and for the purpose of concealing the true condition of the bank, which was then wholly insolvent, and that the plaintiff was deceived thereby, and, because thereof, made his purchase of such stock, by reason whereof he suffered loss to the amount of \$48,000, which he would not have done except for the action of the defendants, (pp. 3 and 4).

Judgment is then demanded in the complaint for \$4800, and interest, (p. 4).

The paragraphs of the complaint hereinbefore marked a, b and c are substantially admitted by the answer (pp. 4 and 5), d, e, f and g are denied (p. 5); paragraph h is admitted, except it is not admitted that the plaintiffs' payment of the assessment was made to save the stock, nor that its value was increased by the amount of \$3000, (p. 6). Paragraph i is qualifiedly denied, the denial each time being coupled with the allegation that the statement thus attested by the directors, and published, was a correct and true transcript from the books of the bank (p. 5, paragraphs 6 and 9 of Answer). It is further denied that the stock was without any value whatever, or did not exceed the value of 10% of its face, when such report was attested by the defendants and published, and that the stock was never after that time worth a greater sum (p. 6, paragraph tenth).

The twelfth paragraph of the answer denies that the defendants knew that the statement was false, and denies that it was made with the intention of deceiving the public or the plaintiff, or anyone else, and reiterates the allegation that it was a true and correct statement of the condition of the bank as shown by its books, (p. 6).

The thirteenth paragraph denies any loss of the plaintiff by reason of such statement, (p. 6).

As a second general defense, it is then set up that the Cashier, John H. DeRidder, and the bank, should be joined as a party defendant, (p. 6).

The issues thus joined by these pleadings came on for trial at a Trial Term of the Court, held in Saratoga Springs on the 25th day of March, 1907.

The evidence on the trial was wholly without contradiction, and the facts proven are as follows:

The plaintiff, residing at Keeseville, Essex County, (p. 28), was in the year 1904 stationed at Ilion, N. Y., (p. 33).

In the month of May, 1904, he had a conversation with his brother-in-law, William R. Waterbury, relating to an opportunity then offered to Waterbury to purchase Citizens National Bank stock, (p. 28). Prior to this time, the attention of Waterbury had been called by one Brownell to the fact that twenty or thirty shares of the stock of the bank could be obtained by purchase, \$165 being asked at first, and later \$160, (pp. 36 and 37). Waterbury then had the conversation referred to with the plaintiff, which took place at the plaintiff's home in Ilion on the 24th of May, 1904, (p. 37). At this conversation, Waterbury told the plaintiff that he knew of a block of Citizens Bank stock, either twenty or thirty shares, that was for sale; that it could be bought for \$165; that their last statement showed that they had a capital of \$100,000, surplus of \$50,000, and undivided profits of between \$13,000 and \$14,000; that they were paying dividends of 5%, and 4%, semi-annually, and that would give it a book value of \$163 or \$164, and that he, Waterbury, would not take \$175 for what he owned. Taylor told Waterbury he would think about it, (p. 37).

Prior to this time, on the 8th day of April, 1904, the bank had published a statement of its condition at the close of business on the 28th day of March, 1904. The making and publishing of this report, and its contents, are admitted in the answer as before seen, (p. 5). In this report it is stated, in its list of liabilities, that the capital of the bank

was \$100,000, its surplus \$50,000, and its undivided profits \$13,456.75—the answer so admits, (p. 5). This report was sworn to by the Cashier of the bank, John H. DeRidder, and was attested as correct by the defendants herein, who were directors, they signing their names under the words "Correct, Attest," in the customary form, (p. 8).

At the time of this conversation between Waterbury and the plaintiff, the plaintiff had not seen this report, nor did he have any other information with respect to the stock except what he obtained from Waterbury, (p. 29). Waterbury stated to him that he had examined the last previously published statement (p. 30), and he had in fact done so (p. 37), and stated to the plaintiff what that report showed, (pp. 31 and 37).

Waterbury believed the report to be true at the time he had this conversation with the plaintiff, and later, (p. 39).

The plaintiff, in making this purchase, relied upon the statements that Waterbury had made to him, as to what the report showed (fol. 152), and had no other information except what Waterbury told him, (pp. 29 and 30).

Waterbury returned from Ilion to his home after the conversation, and, on the evening of that day, (p. 30) the plaintiff wrote to him to find out how many shares of stock could be had at \$160, and asking Waterbury what he thought of the prospects for the future. (See Plaintiff's Exhibit No. 1, p. 30). Waterbury at once replied on the foot of the plaintiff's letter, the plaintiff receiving it shortly after the 25th or 26th (p. 30), that there was offered twenty shares, with a possibility of thirty, and that he thought it a good investment, and would not think of parting with his stock at

the price named (see letter foot of Exhibit No. 1, p. 30). At the time that Waterbury wrote this letter, he believed the report that had been attested by the defendant to be true, (p. 39).

The next occurrence in the transaction was a letter from the plaintiff to Waterbury inclosing two certified checks, one of \$3200, and one of \$1600, and authorizing Waterbury to purchase thirty shares if they could be obtained, and if not, then twenty, the checks being made so that it could be done either way, and the letter told him to keep the certificates until the plaintiff came to Saratoga. (Plaintiff's Exhibit No. 2, p. 31). At the time he wrote this, the plaintiff relied upon Waterbury's statement of what the report showed, (p. 31). This letter was received by Waterbury June 1st, or 2nd., with the checks inclosed (p. 40), and he took the checks to the cashier of the bank, Brownell not having told him, and he not knowing, who the party was who was selling the stock, it having been arranged with Brownell that Waterbury could so leave the checks with the cashier (p. 42), and he told the cashier that he could make out the certificates and in that way close the purchase for the plaintiff, taking the thirty shares and paying therefor \$4800, (pp. 40 and 42). The certificates were made out to the plaintiff, and Waterbury placed them in his safe and held them until the plaintiff came to Saratoga, and then delivered them to him, (p. 40). The money was paid and the purchase completed June 1st, or 2nd, and at that time Waterbury believed the statement published April 8th to be true and correct, and relied upon its correctness in making the purchase, (p. 40). The delivery of the stock to the

plaintiff was made by Waterbury June 27th, (pp. 32 and 40).

It was admitted on the trial that on the 30th day of June, 1904, an assessment of one hundred per cent on the stock of the bank had been ordered paid by the stockholders, on the direction of the Comptroller of the Currency, which assessment was subsequently paid, the plaintiff having paid the amount assessed against his stock prior to the commencement of the action and, further, admitted that the proceedings necessary to make a binding assessment were duly taken, that on the 27th day of June, 1904, a notice was received by the bank, from the Comptroller of the Currency, that the bank's capital had become impaired by the amount of \$100,000, and that, under the provisions of Section 5205 of the Revised Statutes of the United States, such deficiency had to be made good by an assessment upon the stockholders pro rata, to the amount of the capital stock held by each, or the bank would be placed in liquidation, (p. 33). It was further conceded on the trial that there were no losses of consequence suffered by the bank between the 28th day of March, 1904, and the 30th day of June, 1904; that at least thirty days prior to the 28th of March, 1904, (that being the day of which the report published on the 8th day of April spoke), the Comptroller of the Currency had called the attention of the directors of the bank, by letter, to the situation of the bank, and that items amounting to \$194,107.02 must be regarded as doubtful assets, and that immediate steps should be taken to collect them, or remove them out of the bank, and that the defendants had knowledge of this letter from the Comptroller at the time that they at-

tested the report published April 8th, assuming to give the condition of the bank March 28th, and that, of the \$194,107.02 thus mentioned by the Comptroller of the Currency in his letter, \$97,000 never was realized, (pp. 42 and 43).

The only evidence offered on behalf of the defendants was that of C. D. Thurber, cashier of the bank at the time of the trial, who testified that the statement published on the 8th of April was a true statement of the condition of the bank as shown by the books, (p. 45).

It was conceded by the defendants that the items amounting to \$194,107.02 referred to by the Comptroller, in his letter, prior to March 28, 1904, had not been charged off prior to the published statement of March 28th, but were actually on the books and appeared in such published statement, (p. 45).

On the 27th of June, 1904, the plaintiff had a conversation with the defendants, Thomas and Starbuck, and they expressed their sympathy for him, in his loss so soon after purchasing the stock, (p. 32). He also had a conversation with the defendant Thomas, who told him that if Waterbury had asked him about the stock he would have advised him not to buy. This conversation was on the 28th day of June, (p. 32).

On this evidence the Court made a decision finding the corporate charter of the Citizens National Bank, under the National Banking Law, and that the defendants were stockholders and directors thereof during the year 1904, (p. 19).

That on the 6th of April, pursuant to a call of the Comptroller, the report in question was made and was duly published on or about April 8th, a copy of the report being annexed to the answer,

and showing that the capital stock of \$100,000 was fully paid in, that the surplus was \$50,000 and the undivided profits \$13,456.75, (p. 19).

That on or about May 24th, 1904, Waterbury, a brother-in-law of the plaintiff, spoke to the plaintiff concerning the purchase of certain shares of the stock of the bank, informed the plaintiff that he considered it a good purchase, and told plaintiff the substance of the report of April 6th, the amount of the capital stock, the surplus and undivided profits, referring at the time to said report, which was the last one then issued. Then he also informed the plaintiff what dividends the bank had been paying, and his own estimate of the value of the stock, and that the certificates could be purchased at \$165 per share, (pp. 19 and 20).

That on or about the 2nd day of June the plaintiff mailed checks to the amount of \$4800 to Waterbury, with instructions to purchase the stock, and that Waterbury did purchase them for \$160 a share, and the certificates were delivered to the plaintiff on the 27th of June, 1904, (p. 20).

That at the time of the purchase the plaintiff had never seen the published report, and relied upon the statement of Waterbury, and believed and relied upon the fact that the report did show the items as reported to him by Waterbury, (p. 20).

That, prior to the time of the conversation between Waterbury and the plaintiff, Waterbury had seen and examined the report of April 6th, 1904, and believed it to be true when he examined it, and when he communicated the information to the plaintiff, and at the time he purchased the stock on behalf of the plaintiff, and in making such pur-

chase, he relied upon the contents of the report as attested by the defendants, (p. 20).

That, if the statements contained in the report had been true, the stock purchased by the plaintiff would have been worth \$160 a share, (p. 20).

That the report and the statements therein were untrue in the following items, to-wit:

At the time stated in the report the bank did not have undivided profits in any sum, did not have a surplus in any sum, and did not have a capital stock, unimpaired, in the sum of \$100,000, the capital at that time being lost, (p. 20).

That, about June 27, 1904, the bank received a notice from the Comptroller that its capital was impaired in the sum of \$100,000, and must be made good by assessment, or the bank would be placed in liquidation. Directly thereafter, an assessment of one hundred per cent on the capital stock was regularly made, and, before the commencement of the action, plaintiff paid his assessment in the sum of \$3,000 being the sum assessed upon his thirty shares of stock (p. 20).

That between the 28th of March, 1904, and the 28th of June, 1904, there were no losses of consequence suffered by the bank, its financial condition being substantially the same on the 28th of June, 1904, that it was on the 28th of March, 1904, (p. 20).

That on or about the 1st day of March, 1904, the Comptroller, in writing, informed the bank that items carried as ~~assets~~ upon the books of the bank to the amount of more than \$194,000 were doubtful, and that immediate steps must be taken to collect them, or they must be removed from the books of the bank. These items appeared in the report of April 6, 1904. This notice from the Comptroller

was known to the defendants prior to their attestation of the report, and they knew that the items amounting to \$194,000 had not been removed from the books of the bank (pp. 20 and 21).

That, as the time the defendants attested the report as correct, they knew, or had reason to believe, that it was not correct, and they either knew that the statement was untrue, or wilfully refused to make an examination, and attested the report recklessly (p. 21).

That such report was so attested by the defendants with the intention of causing the public to believe that the bank was in the financial condition shown in the report, and that it had unimpaired capital and surplus, and undivided profits in the sum of \$63,000., when in fact the defendants knew, or had reason to believe, that the report was incorrect and untrue in the respects found before (p. 21).

That the plaintiff relied on such report, and was deceived thereby, and, in reliance thereon, he purchased the said stock, and by reason thereof suffered a loss of \$4800., the stock at the time of his purchase being of no value (p. 21).

As conclusions of law the Court found that the plaintiff was entitled to recover from the defendants the sum of \$4800, the difference between the value of the stock as it was in fact, and the value as it would have been if the representations had been true, and was entitled to judgment for that amount with interest and costs (p. 21).

Judgment having been entered upon this decision, as before stated (pp. 21 and 22), the defendants appealed therefrom to the Appellate Division, where the judgment was reversed, unless the plaintiff should stipulate to deduct \$2000, and interest

thereon, from the amount recovered, but if such stipulation was given, then the judgment was unanimously affirmed, without costs (pp. 52 and 53). The plaintiff gave the stipulation required by the order (p. 53) and entered judgment of affirmance, (p. 54) and the defendants, thereupon, appealed to the Court of Appeals (p. 55), where affirmance was had, (pp. 59 and 63) whence they have come here, by Writ of Error, as before stated (pp. 69 and 70).

The judgment should be affirmed.

I

At the time of the commencement of the action the facts here proven and before recited, made out against the defendants a case of deceit at common law.

Saying nothing now of the provisions of the National Banking Act, and not considering the question of exclusive remedy under that act, which is treated hereafter, the action was maintainable as one at common law, for deceit practiced upon the plaintiff by the defendants, in issuing a false statement, by means of which the plaintiff was deceived. It happened that the statement that deceived the plaintiff, was a report of the condition of the Bank required to be published by the Banking Act, but it was not necessary to hold at all that it is an action under any of the provisions of that act.

I shall make no claim here that, as the Counsel who tried the case, I believed it good as a common law action for deceit.

All the elements necessary to maintain such an action for deceit in New York are pleaded in the complaint, and all the allegations of the complaint are shown by the evidence to be true.

The essential elements necessary to constitute a cause of action in such case are representations, falsity, scienter, deception, and injury.

Arthur v. Griswold, 55 N. Y., 400-410,—and the summary of the complaint before given shows each one of these elements to be charged against the defendants. There are alleged:

(a) The certifying to the report,—the representation.

(b) The falsity of the report so attested by the defendants.

(c) The knowledge by the defendants of the falsity.

(d) The deception of the plaintiff.

(e) His damage.

A complaint so alleging states a good cause of action for deceit.

The doctrine is elemental.

Brackett v. Griswold, 112 N. Y., 454-467.

Kley v. Healy, 127 N. Y., 555-561.

Kuelling v. Lean Mfg. Co., 183 N. Y., 78-84-85.

Kingsland v. Haines, 62 App. Div., 146-148.

Ettlinger v. Weil, 94 App. Div., 291-294.

In Mason v. Moore, an Ohio case, 1906 (4 Lawyers Reports, New Series, pp. 597, 605); the Supreme Court of that state recognized that such an action was maintainable at common law. The action there was based on a false report of a bank, as here. The verdict had been for the defendant, and

the Court allowed it to stand, but the legal rules there held are entirely as here contended by the plaintiff. The precise point on which the defendant was there excused, was his lack of knowledge, or of anything to give him reason to believe, that the report was false. On the point here under consideration the Court says, "If we leave the statute 'just considered, and look to the common law liability of directors, we find that actions for damages against them, founded on a published false report of the Bank, which they attested, are actions for deceit, and they are controlled by the law governing actions of that character."

It was not necessary, in such an action, that the representations should be made directly to the party injured, personally, nor that the fraudulent intent related to the plaintiff, or had in view a design to defraud him in particular. If the representations were made publicly, and the plaintiff became one of the victims, then the law gives him a remedy against any one, or all, of the parties who set the machinery by which he was misled, in motion.

Brackett v. Griswold, 14 St. Rep., 449-451.

Mors v. Swits, 19 How. Pr., 275-287.

Barber v. Morgan, 19 How. Pr., 275-87.

Brackett v. Griswold, 112 N. Y., 454-467-468.

In the case last cited, the Court lays down the rule in the following language: "It is not necessary that the false representation should have been made by the defendant personally. If he authorized and caused it to be made, it is the same as though he made it himself, nor is it necessary that it should have been made directly to the plain-

'tiff. If it was made to the public at large, for the
 'purpose of influencing the action of any indi-
 'vidual who may act upon it, any person so acting
 'upon it and sustaining injury thereby may main-
 'tain an action. It is on this ground that promot-
 'ers, or directors, of corporations have been held
 'liable for false representations in the prospectus
 'or reports, or other papers issued by the corpora-
 'tion with their sanction, by which individuals
 'have been induced to purchase the stock, or be-
 'come creditors, of the corporation, and the fact
 'that the false report, or prospectus, purports to be
 'the act of the corporation and not of the promot-
 'ers, or directors, does not relieve them from per-
 'sonal responsibility."

The doctrine here urged was so established by a great cloud of authority that it is not possible successfully to challenge it, and a multiplication of citations could only be useful as an exhibition of learning, and would result only in weariness to the judicial flesh.

In all the foregoing, I have used the word was, referring to the time of the commencement of the action and the time it was tried.

But the case of *Yates v. Jones National Bank* (206 U. S., 158) decided by this Court in May, 1907, holds that an action cannot be maintained at common law for deceit practiced by means of a false report under the National Banking Act, the remedies provided by the act being exclusive.

A recovery had there been had against directors, plaintiffs in error, for attesting a false report, without showing that they knew that the report was false,—by the judgment they were made warrantors of its correctness. This appears both in the instructions to the jury (pp. 167 and 168) and also the

refusal to charge (p. 168), all of which ignored the question of knowledge. Recovery can be had in Nebraska for fraud, without showing scienter (Foley v. Holtry, 43 Neb. 133; Johnson v. Gulick, 46 Neb. 817; Moore v. Scott, 47 Neb. 346) and the holding of the Supreme Court of that state in this Jones National Bank case followed that doctrine. But this Court said that this would not do, because, in such case, directors in some states would be held liable only upon knowledge, in others without knowledge, and that the operation of the statute must be uniform, and knowledge must be shown.

One of the questions, therefore, here, is whether the complaint being good for a recovery under the Banking Act, all the facts necessary to a recovery thereunder being proven, a reversal must be had, because counsel claimed on the trial that the action would lie at common law.

II

Conceding then that in no case an action at common law can be maintained against Directors, for a false report under the Banking Act since the decision in Yates v. Jones National Bank, it still stands that the action is well brought and the recovery right under the terms of such Banking Act.

Section 5211 of that Act prescribes this:

“ Every association shall make to the Comptroller of the Currency not less than five reports during each year, according to the form which may be prescribed by him, verified by the oath or affirmation of the president or cashier of such association

'and attested by the signature of at least three of
 'the directors. Each report shall exhibit, in detail,
 'and under appropriate heads, the resources and
 'liabilities of the (associations) (association) at
 'the close of business on any past day by him speci-
 'fied; and shall be transmitted to the Comptroller
 'within five days after the receipt of a request or
 'requisition therefor from him, and, in the same
 'form in which it is made to the Comptroller, shall
 'be published in a newspaper published in the place
 'where such association is established, or, if there
 'is no newspaper in the place, then in the one pub-
 'lished nearest thereto in the same county, at the
 'expense of the association; and such proof of pub-
 'lication shall be furnished as may be required by
 'the Comptroller. The Comptroller shall also have
 'power to call for special reports from any particu-
 'lar association whenever, in his judgment, the
 'same are necessary in order to a full and complete
 'knowledge of its condition."

The necessary implication of this requirement is
 that the statement thus made and attested must be
 true, and that a false report is prohibited.

And *Yates v. Jones, Nat. Bank*, 206 U. S.,
 158-177, expressly so holds.

Section 5239 of the Act reads as follows:

"Section 5239. If the directors of any national
 'banking association shall knowingly violate, or
 'knowingly permit any of the officers, agents, or
 'servants of the association to violate, any of the
 'provisions of this title, all the rights, privileges
 'and franchises of the association shall be thereby
 'forfeited. Such violation shall, however, be de-
 'termined and adjudged by a proper circuit, dis-
 'trict, or territorial, court of the United States, in

‘ a suit brought for that purpose by the Comptrol-
 ‘ ler of the Currency, in his own name, before the
 ‘ association shall be declared dissolved. And in
 ‘ cases of such violation, every director who par-
 ‘ ticipated in, or assented to, the same, shall be held
 ‘ liable in his personal and individual capacity for
 ‘ all damages which the association, its sharehold-
 ‘ ers, or any other person, shall have sustained in
 ‘ consequence of such violaton.”

We have then the express requirement of the statute that the reports thus to be made must be true, and, if any Director knowingly violates the provisions of the act, or knowingly permits an officer, agent, or servant, to violate the same, as for instance by attesting a false report, he shall be liable for all damages sustained by any person in consequence of such violation. In other words we have the rule prescribed by the Act, exactly the rule, both as to pleading and as to proof, that is prescribed by the decisions of our courts, although not by the courts of Nebraska, (where the Yates case arose) in an action at common law, for deceit.

The plaintiffs in error have been willing to concede thus much, thinking that, when such concession is made, they have impaled the respondent upon the other horn of the dilemma that, in such case, the violation must be determined in a United States Court, in a suit brought by the Comptroller of the Currency, under the terms of Section 5239. In this they are hopelessly wrong.

Let us again recur to the language of this section.

“ If the directors of any national banking asso-
 ‘ ciation shall knowingly violate, or knowingly per-
 ‘ mit any of the officers, agents or servants of the

'association, to violate any of the provisions of this title, all the rights, privileges and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district, or territorial court of the United States in a suit brought for that purpose by the Comptroller of the Currency, in his own name" (in what cases?) "before the association shall be declared dissolved."

No one here is seeking to have the association declared dissolved, because of any violation of this statute. If such were the relief sought, then the violation must be adjudged in a United States Court, and not a State Court. No such case is here presented. When such dissolution of the Citizens National Bank is sought, then this essential prerequisite must be conformed to, and the dissolution be had in the courts of the United States, but such declaration of a violation in a Federal Court is only necessary as a prerequisite to a dissolution of the association.

Then follows the unqualified provision, as to which no preliminary at all is required: "And in case of such violation" (that is any knowing violation of the provisions of the act, or knowing permission of such violation, not necessarily determined in a United States Court but in any proper court) "every director who participated in, or assented to, the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of any such violation."

There are two results that may flow from a violation of the provisions of this section,

1. The franchises of the association may be for-

feited, If such a result is sought, or reached, it must be through the medium of the Federal Courts.

2, The Directors guilty may be held liable for the damages sustained by any person.

But as to this last no limitation of method, or of form, is prescribed. It is a liability that may be enforced in any forum having the proper jurisdiction of person and subject matter.

That this is the proper construction of this section is expressly held by the Supreme Court in *Yates v. Jones National Bank*, at pages 180 and 181, where the present learned Chief Justice thoroughly disposes of the contention that such violation, (i. e., by making a false report) must be determined in a Federal Court, in this language:

"There is a suggestion that the subject matter 'of this controversy is so inherently Federal that, 'although the judgments of the Circuit Court and 'of the Circuit Court of Appeals, remanding the 'cause to the State Court, may not be re-examined ' (25 Stat. 435, chap. 866, U. S. Comp. Stat. '1901, p. 509) nevertheless it should now be decided that the State Court was wholly devoid of 'jurisdiction. This claim is predicated upon the 'provision of Sec. 5239, Rev. Stat., conferring exclusive jurisdiction on courts of the United States 'to declare a forfeiture of the character of a national bank as the result of wrongs committed by 'the directors, and the contention that a declaration of such forfeiture is a prerequisite to an 'action to enforce the civil liability of directors, 'and that such action could only be brought in the 'courts of the United States after a forfeiture has 'been adjudged. We content ourselves with saying 'that we think these contentions are without 'merit."

So the action is well brought, under the Banking Act. The plaintiff here pleaded the facts. He was not required to label his suit. He has recovered on these facts, which this Court is to take as true, and which, beside, are absolutely without contradiction. The learned Counsel for the plaintiffs in error nowhere in his Brief suggest a single change of pleading on the part of the plaintiff, that is, or could be, required under the Banking Act. Every thing there required has been set up in the complaint, every thing set up in the complaint has been proved by the evidence and found by the Court. What else can be asked?

III

It is contended that this is sustaining a recovery here upon a theory different from that upon which the judgment was based by the Special Term. The answer to such contention is, that a correct decision will not be reversed because founded on a wrong reason.

- Marvin v. Universal, 85 N. Y., 278, 284.
- Ward v. Hasbrouck, 169 N. Y., 407, 420.
- Siefke v. Siefke, 6 App. Div., 472-474.
- Penny v. Rochester, 7 App. Div., 595, 606.
- Cullinan v. Furthman, 70 App. Div., 110, 112.

It does not matter that the view of the case taken here differs from that of the Court below, the judgment is justified by undisputed facts, and will, therefore, be affirmed.

- Arnot v. Erie, 67 N. Y., 315, 321.

There can be no claim, that the plaintiffs in error were misled here on the trial. If the judgment should be reversed and a new trial come on, the plaintiff would be required to put in only the evidence which appears in this record here, claiming that it constituted a violation of the banking act, and the court would then be compelled on such evidence to make substantially the findings that it made before.

Counsel on a trial, defending, must look to the evidence adduced, to see if there is any theory on which judgment may pass against him, not to the argument of the opposing counsel. If there is any such theory, then, if he omits any evidence to defeat it, he takes his chance and cannot thereafter complain.

But the plaintiffs in error claim here, and for the first time, that, although every fact necessary to a recovery under the Banking Act, was thus proven and found, that they have never had their day in court, and have been denied due process of law, because the plaintiff below insisted that these same facts authorized a recovery for deceit at common law.

I am not unmindful of the wide range that discussion of what is due process has taken, nor of the protean form in which it is presented to this court. I have often felt like paraphrasing the cry of Madame Roland, "O, Liberty, what crimes are committed in thy name!"—"Oh, due process, what strange things are urged in thy name."

I think the limit has been reached here. To claim that in a duly constituted forum, having full jurisdiction, where the facts were fully presented and are undisputed and fully warrant the judgment rendered, that, in such case, due process was

denied, because it was erroneously stated by counsel that these facts authorized a recovery upon another theory, is beyond anything yet written into the books.

As before seen, the rule is thoroughly settled in New York, that, if the trial court reached a right result, on the facts proven, its judgment will not be reversed, nor interfered with, because such right result was reached by the wrong road. The result arrived at is the despotic fact that controls and must control.

The rule is the same here as in the courts of New York.

This Court will only look to see whether the Federal question has been decided erroneously. If that question has been decided right, it will look no further for errors.

McLaughlin v. Fowler, 154 U. S., 663.

If this rule is applied, the evidence fully makes out a case under the Federal Statute.

And a judgment will not be reversed when it is clear that the error could not have prejudiced, and did not prejudice, the party seeking reversal.

Lancaster v. Collins, 115 U. S., 222, 227.

The plaintiffs in error, however, urge that they were misled by the statement of counsel, that had they supposed that a recovery might be had under the Banking Act, they might have made different, or further, defense.

The complete answer is that exactly the things required for recovery under the Act are those required in New York, to recover for deceit. There is absolute identity of requirements, and the enumeration of supposed differences by the learned

counsel (pp. 35, 36, 37, 38 and 39 Brief) is not convincing. They are these:

1st: That in an action of deceit, the false statement must be voluntary—here the report was compelled by the Department (Brief, pp. 35, 36).

2nd: That in all actions of deceit, it is not necessary to show that the party making it knew the representation to be false,—if he ought to have known it is sufficient,—whereas, under the Banking Act, liability exists only where they knowingly violate, or permit a violation.

3rd: That, in deceit actions, a party can be held liable for the acts of an agent, while, under the Statute, it is only for personal dereliction that recovery may be had.

In their order.

1st: That to warrant a recovery, the false representations must be in a voluntary statement.

The Yates case (206 U. S., 158) holds the direct contrary—that a statement made in a report required to be published by the Banking Act, must be true, and, if false, liability follows, and if the cases cited by the plaintiffs in error hold otherwise, they must be considered overruled by it. And this, too, must dispose of the contention that if the report agreed with the books of the Bank, it was saved from falsity. It is not true. If it were, then a false report could always be saved, by entering the false items on the books. The report must be true, not a true report of false books. But the question is not here. No one was misled below. The pleading and the proof show and always showed that all the representations claimed by the plaintiff in the action to be false, were contained and contained only in the published statement required by law.

2nd: That liability under the Statute can only be predicated on personal wrong—not for the acts of an agent.

Again the question is not here—everything shown here was shown to be the personal act of the plaintiffs in error. No question of agency, nor of liability for an agent misled the plaintiffs in error on the trial.

But, further, exactly the same liability exists under the Banking Act for acts of an agent of a party sued, as in an action for deceit, at common law.

We have before seen the language of section 5239. "If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents or servants of the association to violate any of the provisions of this title. . . . every director who participated in, or assented to, the same, shall be held liable."

Allowing a violation by an officer, agent, or servant, is therefore, equally a ground of liability, with personal violation. Here there was both,—the defendants, themselves, violated, and they permitted, assented to, the violation by the Cashier, De Ridder.

It comes, then, to the last contention of the plaintiffs in error.

3rd: That under the statute a greater degree of proof is required as to knowledge than in an action of deceit, and that the fourteenth finding of fact, of the Trial Court (p. 21): ("That at the time the defendants attested the said report to be correct, they knew, or had reason to believe, that it was not correct, and they either knew that the statement was untrue or they wilfully refused to make an examination, and attested the report

'recklessly.')

is not equivalent to a finding that the defendants "knowingly violated" (the language of Section 5239 of the Banking Act) the Federal Statute.

The making of a false report is a violation of the provisions of this Banking Act. The Yates case expressly so holds. If such violation is made "knowingly," then the directors violating are liable. We have here the finding of the false report that violates the statute, and then the finding quoted, that when the directors so violated the statute, by making and publishing a false report, "they knew, or had reason to believe," that it was false. To say that this is not the equivalent of finding that the directors knowingly violated the statute, is a refinement too great to be convincing.

An assertion that one had "reason to believe" that another had stolen a watch, is equivalent to a charge that such other had stolen it.

Miller v. Miller, 8 Johns., 74, 75.

So here, the finding that the defendants had reason to believe is equivalent to a finding that they did believe, and, if they did believe, in law they knew.

Just where shall it be said "reason to believe" ends, and "knowledge" begins. One cannot shut his eyes to "reason to believe" and then say he does not have "knowledge."

A finding that the defendants knew, or were convinced, is simply stating in two forms, that the defendants knew.

And a statement recklessly made, without knowledge of its truth, which is, in reality, false, is a false statement knowingly made.

Cooper v. Schlesinger, 111 U. S., 148, 155.
Moline Clam Co. v. Carson, 72 Fed. Rep.,
387, 392.

Boddy v. Henry, 113 Iowa, 463, 468.

Rothschild v. Mack, 115 N. Y., 1, 7, where
Judge Peckham wrote.

Hadcock v. Osmer, 153 N. Y., 604, 609.

IV

It is urged by the plaintiffs in error (sub point b, p. 48 et seq., and point V, p. 58 et seq.) that the evidence was not sufficient to show that the items, aggregating \$194,107.02, to which the Comptroller called attention by letter at least thirty days prior to March 28," 1904, and which he said must be regarded as doubtful assets and immediate steps to collect them, or remove them out of the Bank, (See concession, pp. 42 and 43) were, in fact bad, so as to show damage to the plaintiff.

There are several answers:

1st: The concession is that there were no losses of consequence between March 28," the day as of which the report speaks, and June 30th, 1904, the day when the assessment was levied by the stockholders, under the direction of the Comptroller (pp. 33 and 42) and that \$97,000. of such \$194,107.02 were never realized (p. 43).

This concession was made by the defendants to avoid making public in court the items going to make up this worthless \$97,000. The parties making the concession must be held to it and every inference flowing therefrom.

2nd: The assessment of one hundred per cent

levied by the stockholders, under the direction of the Comptroller, is evidence that the stock was wholly wiped out. If it was, there was neither surplus, nor undivided profits, and the \$4,800. of the plaintiff below, which he paid for the stock, was wholly lost. An assessment can only be levied, under the Banking Act, to make good impairment of the capital. The language of Sec. 5205 of the Revised Statutes, covering the question, is "Every association.....whose capital 'stock shall have become impaired by losses or 'otherwise, shall, within three months after receiving notice thereof from the Comptroller of the 'Currency, pay the deficiency in the capital stock 'by assessment upon the shareholders." When, therefore, under the statute, an assessment of one hundred per cent was levied, it was evidence, certainly *prima facie* evidence, that the stock had gone, because an assessment can only be levied where there is an impairment and only for the deficiency. And it was evidence which the defendants did not attempt to controvert. The fact was, then, proven. The trial court was right in giving judgment for the damage, as for a total loss of the stock, (p. 52) although the Appellate Division, out of superabundant caution for the defendant's rights, reduced the recovery to the amount of the loss, assuming that only \$97,000. was bad and the stock to have been good for \$66,500. when the assessment was levied, (p. 58) and the plaintiff stipulated, accepting the modification.

3rd: The affirmance of the judgment, as thus modified by the Appellate Division, was unanimous (p. 53). Under the Constitution of the State of New York, where a decision of the Appellate Division is unanimous on a question of fact,

the Court of Appeals is without power to review the fact thus found and affirmed. The language is this, being section 9 of Article VI of the Constitution: "No unanimous decision of the Appellate Division of the Supreme Court that there is evidence supporting, or tending to sustain, a finding of fact, or a verdict not directed by the court, shall be reviewed by the Court of Appeals."

In pursuance of this provision of the Constitution, the legislature passed this provision, which is sub-division 4 of section 191 of the Code of Civil Procedure, relating to the jurisdiction of the Court of Appeals in civil actions: "No unanimous decision of the Appellate Division of the Supreme Court, that there is evidence supporting, or tending to sustain, a finding of fact, or a verdict not directed by the court, shall be reviewed by the Court of Appeals." And the Court has unvaryingly held that where there is such unanimous affirmance, the only questions open to review on an appeal to the Court of Appeals are exceptions to the admission, or rejection, of evidence, and to the charge of the trial judge.

In *Meserole v. Hoyt*, 161 N. Y., 59, 61, Judge O'Brien, speaking for the Court on the point, says, "The unanimous affirmance of the judgment concludes this court and we are required to assume, in such a case, that the evidence was of such a character as to justify the submission of the disputed question to the jury. It is quite true that the question as to whether there is any evidence tending to prove the fact is one of law, but the convention that framed the constitution and the people adopting it, had, of course, the same power to limit the jurisdiction of this court with respect to questions of law as they had with respect to

‘questions of fact, and the effect of that limitation upon the power of this court to review the unanimous decision below, that there was evidence to sustain the verdict, is to withdraw a particular question of law which was formerly reviewable here, from our jurisdiction. It was the intention of the framers of the constitution to make the Appellate Division, when unanimous, the court of last resort upon this particular question.’

The doctrine is held in a cloud of cases and cannot be challenged.

Niagara Falls v. Central, 168 N. Y., 610, 611 and cases there cited.

The question, therefore, was not before the Court of Appeals as to whether the finding of the trial court that there was an impairment of the capital stock of the Bank, which finding had been unanimously affirmed by the Appellate Division, was sustained by the evidence. It was expressly precluded from going into that question.

The writ of error allowed by this court, which brings the judgment entered upon the affirmance by the Court of Appeals here for review, was for the purpose of seeing whether the Court of Appeals committed error, and I do not understand that this court either does, or can, grant writs of error except to the highest court of a State.

The doctrine is so laid down in

Fisher v. Perkins, 122 U. S., 522.

Mullen v. Beef Co., 173 id., 116.

But whether a writ of error may, or may not, issue to any inferior court of a State, it did not do so here,—it issued to the Court of Appeals (p.

69). It was prayed for to that Court, and allowed as prayed (p. 63). And this is so although the record had been certified by the Court of Appeals to the lower court.

Underwood v. McVeigh, 131 U. S.

So, the writ, under which review and reversal is here sought, must either find error in the Court of Appeals, or nowhere, because it runs to no other court. And there was no error there, no matter how much below.

Section 709 of the Judiciary Act provides that "A final judgment or decree in any suit in the 'highest court of a State in which a decision in 'the suit could be had.....may be re-examined 'and reversed or affirmed in the Supreme Court, 'upon a writ of error."

It comes then that, even if the Appellate Division was in error in unanimously affirming, the Court of Appeals was right in affirming the judgment thus unanimously affirmed, because it had to assume that the facts found by the Trial Court, and thus unanimously affirmed by the Appellate Division, were sustained by the evidence. It cannot then be said that the Court of Appeals erred in doing what it was compelled to do, by the Constitution, no matter how true may be the contention of the plaintiffs in error that the evidence was insufficient to show impairment of the capital of the Bank, and consequently to show damage to the plaintiff.

If this court should here reverse, it would disagree with the Court of Appeals for doing something it was bound to do under our Constitution. If it should remand, it would thrust upon the Court of Appeals the duty of correcting an erroneous

ous finding of fact, unanimously affirmed by the Appellate Division, the power to correct which is expressly withheld from that court by the Constitution of the State under which it exists.

Moreover, on a writ of error, this Court cannot review a question of fact.

Dower v. Richards, 151 U. S., 658, 663.

Nor do I think that any error as to the finding of fact that loss did occur, is specified in the Assignment of Errors. (pp. 63, 64, 65)

I do not regard the point as of great consequence, because the fact found by the trial court was sustained by the evidence, but I regard it as an answer to the contention of the plaintiffs in error, were the other answers not good.

V

Finally in answer to the undertone of jeremiad of the defendants' brief—a jeremiad that deems it hard that the defendants should have to respond in such a case, it is suggested that there is, at least, a little hard luck on the part of the plaintiff, a Minister of the Gospel, in purchasing, on the representations of the report attested to be correct by these defendants, (a report that was hopelessly incorrect) stock for \$4,800, which within a month of the time when, by the action of the Comptroller and the stockholders, it was adjudged wholly worthless, and worse than worthless. In view of the chronology, and the rapid succession, of events, shown in the record, it hardly lies in

the mouths of the defendants to claim that, on a balancing of equities, the weight lies with them.

If there ever was a case where a party has the right to claim that his treatment was "raw," the plaintiff here has it in abundance.

The judgment is right and should be affirmed, and the Writ of Error be dismissed.

Saratoga Springs, N. Y.

January 2," 1912.

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